IN THE

Supreme Court of the United States.

OCTOBER TERM, 1879.

THE UNITED STATES, APPELLANTS,
vs.
HENRY CLAMORGAN, *et al.*, APPELLEES. } No. 81.

HENRY CLAMORGAN, *et al.*, APPELLANTS,
vs.
THE UNITED STATES, APPELLEES. } No. 82.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF

For Henry Clamorgan, Leon A. Clamorgan, and Julius Clamorgan, Appellants in suit No. 82, for same as Appellees in suit No. 81, and for the heirs of Louis Labeaume, as Appellants and Appellees in the same suits.

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STATEMENT OF CASE.

☞ *Note.—Citations of State Papers in this brief refer to the series on Public Lands, edition of Gales & Seaton.*

This is a proceeding in equity instituted in the District Court of the United States for the Eastern District of Missouri, under the 11th section of the act of Congress approved 22d June, 1860, (12 Stats., 85,) as revived and amended by the act of 10th June, 1872, (17 Stats., 378.) These acts provided for the adjustment of certain private land claims in Missouri, Florida, and Louisiana by proceedings before commissioners or the Federal courts.

Henry, Leon A., Julius, and Cyprian Clamorgan, in their petition, prayed the judicial recognition of the validity of a grant to three tracts of land made to their ancestor, Don Jacques Clamorgan, by Spain, in Louisiana, in the year 1797, comprising a large quantity of land situated in the present State of Missouri, on the right bank of the Mississippi river, a few miles above its

confluence with the Missouri. The history of this grant is briefly this: On the 12th of May, 1794, the Spanish colonial authorities in Louisiana organized or authorized "a Spanish company for the purpose of making discoveries to the westward of the Missouri," (record, 135), and Don Jacques Clamorgan became its principal director and representative at Saint Louis. (Record, 136 and 142.) The organization and objects of the company having been laid before the king he approved the same, authorized it to arm and maintain forts, (record, 136,) and agreed to allow it the sum of ten thousand dollars annually to defray the expenses thus incurred, (record, 126, 128, 136, 137, 138, 139, and 142;) also allowed ten years' exclusive trade with the Indians of the Upper Missouri. The promised aid of the king was not paid, the company became involved, gave up its mission and whatever advantages it had in view, not, however, before it had made some sacrifices and suffered heavy losses. (Record, 126, 127, and 140.) A dissolution followed and Clamorgan was authorized to adjust the company's claims against the royal treasury, and to receive such compensation as he could get. (Record, 142.) The king had more wild land than money, (record, 136 and 137,) and it seems Clamorgan, after sustaining a well-made effort to obtain the latter, and meeting with refusal, or delay, (record, 126, 127, 136, 138,) finally became a petitioner for as much of the former as he thought would be useful to him. (Record, 126, 127.) His petition was dated St. Louis, March 1st, 1797, and addressed to Don Zenon Trudeau, then Lieutenant Governor, under Spain, of Upper Louisiana. It states the facts and hardships of the case, and asks, as indemnity for the losses and services alleged, a grant for three tracts of land which it described minutely. On the 3d of March, 1797, the Lieutenant Governor granted the prayer of the petition, and issued to him the usual concession, in which the services and losses of the grantee were recognized, and the motives for the grant set forth. (Record, 128). It contained the customary order of survey, telling the surveyor to survey the land so soon as he had time. On the 11th of March the Lieutenant Governor promptly sent an "official note" to the Baron de Carondelet, at New Orleans, then Political and Military Governor of the province, (record, 129), telling him he had made the grant, and his motives for so doing. On April 5th the Governor wrote the Lieutenant Governor approving what he had done, and ratifying the grant. (Record, 130.)

The Province of Louisiana was retroceded, by Spain, to France by the third article of the treaty of San Ildefonso, of 1st October, 1800, (8 Stats., 202,) but Spain remained in possession. The United States acquired the province by the first article of the Treaty of Paris, of 30th April, 1803, (8 Stats., 200,) and took possession of Upper Louisiana, at St. Louis, on the 10th of March, 1804, (sec. 1, Act 26 May, 1824.) By section 3, of the act of Congress of March 2d, 1805, (2 Stats., 324,) a recorder of land titles, and, by section 5, two commissioners were provided for the part of the province embracing the present State of Missouri, in order that claimants to lands might present to them, as a board of land commissioners, their titles emanating from France, or Spain, for the recognition, or confirmation, of the United States. The act was amended by sections 1, 2, 7, and 8 of the act of the 21st April, 1806, (2 Stats., 391,) and by sections 1, 4, 5, 6, 7, and 8 of the act of March 3d, 1807. (2 Stats., 440.) The law stood thus when Clamorgan, on the 27th June, 1808, at St. Louis, filed his notice of claim before the recorder, and produced, for record, his written evidence of title. (Record, 130–131; and 2 State Papers, 629.)

On November 14th, 1811, the board rendered a brief decision adverse to the claimant, (record, 131–132,) and on the 20th of January, 1812, they made their report to the Secretary of the Treasury, who, through the Commissioner of the General Land Office, on the 1st December, 1812, laid the same before Congress. The decisions on the Clamorgan claims are on page 629 of the second volume of the State Papers. Congress has never taken action upon the part of this report adverse to Clamorgan.

On the 20th October, 1813, Clamorgan sold the grant to Jean Eli Tholozan, of St. Geneveive county, in the then Territory of Missouri, (record, 145,) who, on the 24th of the same month, sold the same, with other lands, to Cyprian Martial Clamorgan and Maximin Clamorgan, children of Don Jacques Clamorgan, reserving to himself one-half the lands if, within twelve years, he should succeed in having the title confirmed by the United States. (Record, 148, 149, and 150.) In this sale the vendees are recognized as children of the Spanish grantee, and the price of the land as paid on their account out of money left them by their mother. (Record, 148.)

On the 9th of May, 1816, Tholozan again sold the same, with other lands, to Louis Labeaume, for the consideration of two thou-

sand dollars. (Record, 28, 152, and 153.) This act of sale was recorded in St. Charles county on the 9th of May, 1816, (record, 28 and 153;) the prior sale from Tholozan to the Clamorgans was recorded there the 14th October, 1816, (record, 29 and 150,) and the sale from the Spanish grantee to Tholozan was recorded March 1st, 1816. (Record, 28 and 145.) In three preceding sales the lands are described as containing 448,000 arpens. It seems Clamorgan died in 1814.

On January 15th, 1818, Risdon H. Price and Charles Fremon Delourier, acting for the legal representatives of Jacques Clamorgan, presented a petition to Congress, praying the confirmation of the foregoing grant, in which they describe the quantity as 448,000 arpens. (3 State Papers, 303 to 309; also House Journal 15th Congress.) This petition states the case with fervor and at much length, and is accompanied with much of the evidence adduced before the dictrict court in this suit. On the 11th February following, the House Committee reported a bill, but no action was had upon it.

On the 26th May, 1824, there was approved the important act usually known as "The Missouri act of 1824," providing for the judicial confirmation in the State of Missouri, and Territory of Arkansas, of such claims as Clamorgan's, (4 Stat., 52.) By the third proviso, to the 12th section, the courts were denied jurisdiction of the Clamorgan grant, and, it seems, several efforts were made, subsequently, to induce Congress to remove the restriction, but without avail.

On July 9th, 1832, there was an act approved authorizing a new board of commissioners, for Missouri alone, (4 Stat., 565,) whose duty it was to review all the claims, and evidence thereof, previously presented to the commissioners under former laws, and remaining unconfirmed, and to report their opinions to Congress upon the same. This board made three reports at different dates, the last dated September 30th, 1835, communicated to the Senate on December 15th, 1835, (8 State Papers, 20 to 243.) Claim No. 152, on page 233 of this report is the one now before the court. On page 20 the board discuss it, and, on page 21, they present a skeleton diagram of certain townships, and fractional townships, on a reduced scale, extracted from the approved maps of federal surveys, upon which they superadd an hypothetical location of the

Clamorgan grant. No action has ever been taken by Congress, on their adverse opinion.

By act of Congress, of 17th June, 1844, (6 Stat., 676,) the Missouri act of 1824 was revived for five years, and amended, but the proviso to the 12th section, excluding the Clamorgan grant from judicial cognizance, was not affected, and, of course, the title remained in abeyance. This injustice, or perpetuation of injustice, led to an earnest appeal to Congress on the part of the legal representatives of Clamorgan. They presented a petition, on the 27th January, 1846, stating their grievances, and asking that they be allowed to seek relief in the federal courts, as other claimants could do. The petition was appropriately referred, and that was the last of it. (House Journal, 29th Cong., 1st Sess., pp. 311 and 324.)

On the 30th March, 1848, the heirs of Clamorgan, by petition, again appealed to Congress to remove the restrictions, (House Journal, 30th Cong., 1st Sess., p. 638,) and on the 26th April, following, the Committee on Private Land Claims, of the House, to whom the petition had been referred, made a favorable report, (No. 506,) accompanied by bill. (House Journal, 729.) But no further action was taken by the House.

On the 12th April, 1848, the same petition had been presented to the Senate when it was referred to the Committee on Public Lands, and, on the 17th April, it was referred to the Judiciary Committee. On the 2d March, 1849, this committee made a report in favor of opening the courts to the claim, but with certain restrictions not contained in the report of the House Committee. It was accompanied by a bill (No. 489) for that purpose, but did not reach a vote. (Report of Committee, 328, 30th Cong., 2d Sess.)

On March 10th, 1852, the claim was again presented to the House for confirmation, and was referred to the Committee on Public Lands. No action was had on this petition. (House Journal, 32d Cong., 1st Sess.. 453.)

On April 14th, 1852, the claim was presented to the Senate, for confirmation, during the 1st session of the 32d Congress, when it was referred to the Committee on Private Land Claims. On the 28th of August, following, they made an elaborate and favorable report (No. 354,) accompanied by a bill, (No. 551,) for its confirmation, (Senate Journal, 32d Cong. 1st Sess., 653.) This report

is an able and just exposition of the title, and to it we invite attention. The report is an appendix to this brief. It seems to have been a unanimous one. But it did not reach a vote, it seems, and notwithstanding it is unanswerable, and manifestly just, it resulted as the other appeals to Congress had resulted.

The act of 22d June, 1860, (12 Stats. 85) did not exclude Clamorgan's grant, and hence it was put in suit, at St. Louis, by petition filed on the 28th July, 1873, in the District Court of the United States for the Eastern District of Missouri.

It appears that prior to 1863, Cyprian Martial Clamorgan, and Maximin Clamorgan, having died seized of certain property, their administrator sold the same, and doubts had arisen if the sale was valid on the ground that, in default of legal heirs, their estates had passed by escheat to the State of Missouri. To quiet the title under the sale, and for other reasons, an act of the legislature was approved, March 23d, 1863, (acts Mo. Legislature for 1863, p. 209. & Record 161,) directing the proper probate court to ascertain the natural heirs of these persons, and to distribute their estates among them according to the laws of Missouri, and relinquishing, in favor of such heirs, so ascertained, whatever rights the State had acquired by escheat, or otherwise. The said act is as follows:

"An act for the relief of Henry Clamorgan, Cyprian Clamorgan, and the heirs of Louis Clamorgan, deceased.

Whereas, the administrator of Cyprian, Martial and Maxime Clamorgan, did, on the —— day of December, 1859, sell to the highest bidder all the right, title and interest of his intestates in and to a certain certificate of location, issued by the Surveyor General, on the eighth day of August, in the year 1859, to Regis Loisel or his legal representatives, for thirty-eight thousand one hundred and eleven and ten hundredths acres of land, located in the territory of Kansas, for the sum of three thousand six hundred dollars, and whereas the said Cyprian, Martial and Maxime Clamorgan, at the time of their decease, had no legal heirs according to the laws of inheritance of the State of Missouri, and their estate would therefore, by law escheat to the State of Missouri; And whereas, Henry Clamorgan, Cyprian Clamorgan, and the children of Louis Clamorgan, deceased, are the sole natural heirs of the said Cyprian, Martial and Maxime Clamorgan, and alone have a natural claim to the estate of the said intestate estates: therefore,

Be it enacted by the General Assembly of the State of Missouri:

§ 1. That the Court of Probate of St. Louis county be authorized and directed, on application of the parties in interest, to hear testimony to ascertain who are the natural heirs or claimants of the estate of Cyprian, Martial and Maxime Clamorgan, the deceased intestates.

§ 2. That when the natural heirs or claimants of said estate are ascertained, the said estates shall be administered and distributed among such natural claimants according to the laws of distribution in all respects as if said natural claimants were the lawful heirs of said intestates.

§ 3. That the State of Missouri does hereby relinquish all claims to said estates by virtue of the law of escheats, or otherwise, in favor of the said natural claimants.

§ 4. That this act *to* take effect from and after its passage.

Approved March 23, 1863."

In due course the probate court, at St. Louis county, Missouri, found Henry Clamorgan, Cyprian Clamorgan, Leon A. Clamorgan, and Julius Clamorgan, such heirs, and the estates of the decedents were ordered to be administered in their behalf, the first two taking each a third in each estate, and the last two each a sixth in each estate, (record 161, 162, and 163.)

In the court below the United States, in the suit of the Clamorgans, by answer (record, 27,) pleaded, as a defense, the deed from Tholozan to Louis Labeaume, of the 9th May, 1816, heretofore referred to, (record, 152,) the heirs of Labeaume having, on the 9th of June, 1875, (record, 45,) filed a separate suit, in the same court, for confirmation of title in their behalf, to the same lands sued for by the Clamorgans. And they deduced title from the same primordial grants, and from the deed of Tholozan to their ancestor. For the purposes of trial the suits were consolidated on May 2d, 1876, (record, 31,) and the answer in the Clamorgan suit, it was agreed, should stand so far as applicable, as an answer in the Labeaume suit, saving rights based on conflict of interest for future determination. On the 13th of June, 1876, (record, 154 et seq.,) the heirs of Labeaume sold their interests, under the sale to their ancestor, to three of the Clamorgan heirs, viz: Henry Clamorgan, Julius Clamorgan, and Leon A. Clamorgan, in the ratio of one-half to Henry, and one-fourth each to Julius and Leon.

On June 9th, 1875, Mary Tunstall, *et al.*, filed a petition, in intervention, claiming an interest in the lands, (record, 21,) but, on the 22d of June following, the same was dismissed by consent, (record, 34.)

The consolidated suits came on for trial, and on the 23d June, 1876, a decree was passed, and signed, confirming the grant to Don Jacques Clamorgan, restricting the quantity to 94,136 acres, finding the fact of the prior disposition of the same by the United States, and allowing Henry, Julius, Leon A., *and Cyprian Clamorgan*, to locate, in lieu thereof, an equal quantity of indemnity lands, elsewhere, (record, 67.)

It was pronounced *pro forma*, saving "the rights which any of the said complainants may maintain, as against any other of said complainants, in any suit, or suits, pending, or to be instituted, to settle conflicts of title patent on the record." From this decree appeals were taken by the United States as defendants in both suits and by the Clamorgan heirs and Labeaume heirs as complainants in the two consolidated suits, the United States agreeing (record, 69) to take out the transcript of the record, and that all appeals should be tried thereupon. A separate appeal was granted Cyprian Clamorgan, (record, 38–70.)

The appeals of the United States, and of the petitioners in the two consolidated suits, were filed here on November 17th, 1876, and of Cyprian Clamorgan on December 16th, 1876.

These appellants complain of so much of said decree as limits the quantity of indemnity lands to 94,136 acres, claiming that it should have been for 675,000 acres; they also complained of so much thereof as recognizes any right in Cyprian Clamorgan to participate therein, claiming that said decree should have been solely and exclusively for the use and in the names of Henry Clamorgan for one-half and Julius and Leon A. Clamorgan each for one-fourth part.

But if the Court is of opinion that the deed from the heirs of Labeaume to the above-named three Clamorgans, be insufficient in form or substance as a conveyance, then we ask that the decree here be in favor of the heirs of Labeaume, *nominatim*, according to the derivative rights and portions of said heirs as shown in the record.

If the conveyance be good in part, viz: as against those who,

not being minors, have executed the same, then we ask that the decree be in favor of the three Clamorgans, Henry, Leon A., and Julius, for the portions of the whole belonging to such persons, and in favor of the other Labeaume heirs for the remainder. In other words, the conveyance from the Labeaume heirs, being good as to Henry T. Blow, Socrates Newman, Mary E. Labeaume, Eugenia O. Labeaume and Susan L. Labeaume, and their petition (record, 51) showing their aggregated portions amount to 11-24ths of the whole, or 309,375 acres, (if the whole be fixed at 675,000 acres,) we ask that for such portion the decree be in favor of the Clamorgans, and in favor of the other Labeaume heirs for the residue.

QUESTION OF JURISDICTION.

Ignorant of the points on ~~what~~ which the Government will rely in the argument this brief can only anticipate them. No question was raised as to jurisdiction in the court below, and we would not expect it to be raised here but for two late decisions of this court in cases under the act of 1860. We refer to Scull vs. The United States, and the United States vs. Baltimore, decided last term. (8 Otto, 410 and 424.) These cases may give rise to a question of jurisdiction, and the following argument is provided only against such a contingency. If the point is not raised, and the court does not raise it, this part will be passed unnoticed.

The act of 22d June, 1860, is the product of careful study of the subject of the unadjusted land claims in the States affected by it. As such its omissions and inconsistencies afford a comment upon modern legislation. Omitting to provide a convenient or any channel in the nature of land scrip or certificates, under which confirmees might obtain, at the proper land offices, the indemnity lands to which sections 6 and 11 might entitle them, failing to recognize the assignability of such certificates, or to provide patents for the locations when made, though providing such for the lands in place, (section 11,) it left it to the General Land Office *ex gratia* to issue, if it saw fit, appropriate certificates of the right to the indemnity in any case, and to recognize or refuse the right of assignment of such certificates. The result was successful claimants here, whose lands had been disposed of, were unable to reap the benefit of their admitted right of indemnity, and Congress finally had to come to their relief with the act of 28th January, 1879, (20

Stat., 274,) directing the Commissioner of the General Land Office to issue the certificates under his seal, to recognize their assignabilty, and to patent locations made with them. The act of 1860 was not a year old before it was found, by those charged with its execution, to be irreconcilable with itself. The Commissioner of the Land Office, by circular to the commissioners, under sections 1, 2, and 3, of 25th October, 1860, told them to assume jurisdiction of claims originating with *de facto* governments, notwithstanding section 3 warred against section 1 in excluding such from their consideration. (Report of Gen. Land Office for 1872, p. 67.)

Section 1 is as follows: "That any person or persons, and the legal representatives of any person or persons, who claim any lands lying within the States of Florida, Louisiana, or Missouri, by virtue of grant, concession, order of survey, permission to settle, or other written evidence of title, emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said States were formed, or during the period when any such government claimed sovereignty or had the actual possession of the district or territory in which the lands so claimed are situated, shall be, and they are hereby, authorized to make application for the confirmation of their title to the lands so claimed in the manner following, to wit., they shall file notices in writing, together with the evidence in support of their claims, before the commissioners hereinafter designated within whose district the lands claimed may be situated, together with a brief abstract of the title of the claimant, and copies of the plats of the survey thereof, whenever such surveys have been made and are within the possession of the claimant, and accompanied with a sworn statement by the claimant of the lands supposed to be covered by his claim, according to the legal divisions and subdivisions of the surveys made by the United States, if the land claimed is included in any survey so made; and the said notices, evidence, and the decisions of the commissioners thereon, shall be recorded in a book kept for that purpose, a transcript of which shall, from time to time. be transmitted to the Commissioner of the General Land Office."

It is clear this section embraces all claims founded upon any kind of written evidence of title, whether perfect or imperfect, legal or equitable, emanating from the parent colonial government, before or after cession to the United States. More briefiy stated it embraces perfect and imperfect titles, *de jure* or *de facto*, contem-

plating their submission to, and ultimate confirmation through, the commissioners provided for by section 2.

Section 3 is as follows: "*And be it further enacted*, That the claims so presented and passed upon by the commissioners, as aforesaid, shall be by them divided in their report into three distinct classes, as follows, viz:

"*Number one* shall contain all claims, which in their opinion ought to be confirmed, where the lands claimed have been in possession and cultivation by the private claimants, or those under whom they derive title, for a period of at least twenty years preceding the date of filing the claim, by virtue of some grant, concession or order of survey, permission to settle, or other written evidence of title, emanating from some foreign government which held or claimed sovereignty or jurisdiction over the territory in which the lands claimed are situated, and where the title emanating from such foreign government bears date anterior to the cession of said territory to the United States.

"*Number two* shall contain all claims which, in their opinion, ought to be confirmed, where the lands are claimed under written evidence of title, as above provided in class *number one*, but where there has been no actual possession and cultivation of the land claimed for a period of at least twenty years prior to the filing of the claim.

"*Number three* shall contain all claims which, in their opinion, ought to be rejected, whether from defect of proof, suspicion of fraud based on probable ground, uncertainty of location, vagueness of description, or any other cause sufficient, in their opinion, to justify such rejection: *Provided*, That in no case shall such commissioners embrace in said classes *number one* and *number two* any claim which has been heretofore presented for confirmation before any board of commissioners, or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured and maintained by fraudulent or improper means; nor shall any such claim be received or considered by the commissioners which has been already twice rejected on the merits by previous boards."

Now, it seems plain enough that, by the letter of section 3, claims founded on *de facto* titles, complete or incomplete, are not provided for. If filed before the board of commissioners such claims could not be classed by them in class *one*, for it is sacred to *de jure* titles, by which we mean titles originating prior to cession. Nor could

they be placed in class *two*, for it is sacred to just such claims as are described in class *one*, the difference in the classes being merely as to possession and cultivation, which are not ingredients of title at all, but equities arising after. Nor could they be placed in class *three*, because it must contain all claims which, in the opinion of the board, "ought to be rejected, whether from defect of proof, suspicion of fraud based on probable ground, uncertainty of location, vagueness of description, or other causes sufficient, in their opinion, to *justify* such rejection;" an array of causes for rejection which, with the spirit and intent of the act, leaves no doubt that Congress did not intend as one of them the fact that a title, otherwise unobjectionable, merely originated after cession. Section 3 can only be made to harmonize with section 1 by substituting the word "*or*" for the word "*and*," in the closing part of clause *number one*, making it read "*or* where the title emanating from such foreign government bears date anterior to the cession of said territory to the United States." And this was done by the Land Office in its circular instructions, of 25th October, 1860, referred to.

Section 11, the most obscure part of this obscure law, and with which we have chiefly to deal, is as follows: "*And be it further enacted*, that in any case of such a claim to lands as is hereinbefore in the first section of this act mentioned, where the lands claimed have not been in possession of, and cultivated by the original claimants, or those holding title under him or them, for the period of twenty years aforesaid, and where such lands are claimed by complete grant or concession, or order of survey duly executed, or by other mode of investiture of title thereto in the original claimant or claimants, by separation thereof from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses and distances, by the competent authority, prior to the cession to the United States of the territory in which said lands were included, or where such title was created and perfected during the period while the foreign government from which it emanated claimed sovereignty over or had the actual possession of such territory, the person or persons, his, her, or their heirs, devisees, legal representatives or grantees, so claiming such lands, may, at their option, instead of submitting their claim to the officer or officers hereinbefore mentioned, proceed by petition in any district court of the United States, within whose jurisdiction the lands, or any part of the

lands, claimed may lie, unless such claim comes within the purview of the third section of this act, to which petition the United States shall be made defendant, and it shall be verified by the oath of the party or parties, and conform to the provisions of section one of this act, and to the practice of such court in chancery, and the attorney of the United States for such district shall defend against the same for the United States; and the court shall decide the claim valid or invalid according to the principles established in this act, and decree accordingly. If the decree be against the United States, an appeal shall be entered to the Supreme Court of the United States; and if it be against the claimant or claimants, he or they may take an appeal directly to that court, as of right and of course, without affidavit or security other than for costs; and the same shall be adjudged *de novo* in the Supreme Court as in other cases of appeals thereto in chancery, and as equity, and justice, and the principles aforesaid may require; which decision shall be final, and patent shall thereupon issue, if the claim be adjudged valid, for so much of the lands claimed as remain unsold; and for so much as may have been sold, the provisions of section six of this act shall apply and be in force."

The part of this section material to us we would read thus: "In claims like those, described in Section 1, founded on complete grant, *or* on concession *or* on order of survey duly enforced, (*or* on other mode of investiture of title in the original claimants, by severance from the domain, which severance may be either by survey, *or* by definition of fixed natural and ascertainable boundaries, *or* by definition of initial points, and courses and distances thence, the severance being by the competent authority,) before the cession to the United States, of the territory including the claim; *or* where such title was created and perfected while its parent foreign government had actual possession of, or claimed sovereignty over, such territory, the owner, instead of filing his claim before the board, may file a petition for confirmation in the proper court, unless such claim comes within the *proviso* to the third section."

Now it is contended, by the United States, that the title before the court is not one whereof the court below should have entertained jurisdiction under section 11. And the ground of this objection is it is an incomplete and imperfect title, whereas section 11, as construed in the Scull, and Baltimore cases, at the last term, (8 Otto, 411 and 424,) only provided for suits on titles com-

pleted and perfected under the parent colonial government. The language of the section would never have originated this objection in the minds of counsel, but it must be confessed there is much in the opinions of this court, in the foregoing cases, to justify it. While we do not admit that the title sued on here is an imperfect inchoate title in any other than a technical sense, yet, for the sake of argument, we will suppose it to be such. Now we are told section 11 does not embrace such a title. Its first words are those of description: "That in any case of such a claim to lands as is hereinbefore, in the first section of this act, mentioned," &c. What follow are words of limitation upon the description. The antecedent descriptive words are those of section 1, not a part of them, but all of them. Referring to that section we find it describes, plainly enough, claims founded upon *any* "written evidence of title, emanating from any foreign government, bearing date prior to cession to the United States," * * * "or during the period when any such government claimed sovereignty, or had the actual possession of the district, or territory, in which the lands, so claimed, are situated." There can be no question that the titles here described are complete and incomplete titles, dating before or after cession. These words, quoted from section 1, are the only words of description in the section. Hence we are justified in supposing they alone are referred to in the first two lines of section 11, above quoted. If this be so then it would seem clear that, if the subsequent part of section 11 does not qualify the description, so as to exclude the class of incomplete titles plainly embraced by section 1, such titles must be regarded as within section 11 by adoption. Now do the remaining descriptive words of section 11 exclude such titles? They are, "where the lands claimed have not been in possession of, and cultivated by the original claimants, or those holding title under him or them, for the period of twenty years aforesaid, and where such lands are claimed by complete grant or concession, or order of survey duly executed, or by other mode of investiture of title thereto in the original claimant or claimants, by separation thereof from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses and distances, by the competent authority, prior to the cession to the United States of the territory in which said lands were included, or where such title was created and perfected during the period while the

foreign government from which it emanated claimed sovereignty over or had the actual possession of such territory," &c.

The decision in the leading case of Lynde (11 Wall., 647) distinctly contemplated the judicial confirmation under section 11 of a claim which might be "honest and meritorious, but defective in point of form or completeness."

We hold that this language makes it clearer than ever, though it was clear enough before, that incomplete and imperfect titles are appropriate subjects for judicial cognizance. Its limitations upon the description of titles, borrowed from Section 1, are obvious: 1st, They must not appear to be fortified by occupancy and cultivation for twenty years, (a most unaccountable exclusion;) 2d, they must be fortified by survey or *other* mode of severance, as described in the section, which survey or other severance must have been "by competent authority;" 3d, All of which inception of title, actual survey, or other severance, must have been prior to the cession; 4th, "Or where such title was created and perfected during the period while the foreign government from which it emanated, claimed sovereignty over, or had the actual possession of," the territory including the land. In such cases, supported by these requirements, an option is given to the claimants to file or sue. There is another limitation, further on in section 11. We refer to the following: "unless such claim comes within the *purview* of the third section of this act." But as this, as decided in the Scull case, meant the *proviso* of the third section, and as that proviso cannot be construed to embrace our title, we leave that out of consideration.

But, aside from its reference to the titles described in section 1, we hold that section 11, read alone, may reasonably be construed to embrace imperfect grants if they, in other respects, conform to the requirements of the section. How can the following be otherwise understood, "where such lands are claimed by complete grant, or concession, or order of survey duly executed, or by other mode of investiture of title thereto, in the original claimant or claimants, by separation thereof from the mass of the public domain, either by actual survey, or definition of fixed natural and ascertainable boundaries, or initial points, courses and distances, by the competent authority, prior to the cession to the United States of the territory in which said lands were included." This language describes three kinds of claims, viz: 1st, those founded

on "complete grants;" 2d, those founded on concessions;" 3d, those founded on "orders of survey duly executed." But as Congress knew, from the history and legislation, that these classes would not embrace all the various kinds of meritorious claims, likely to be found in the States affected by the bill, and which it was designed to bring before the courts for final adjustment, it added a fourth class, or rather words of a general character, embracing a number of classes. It did so by declaring that claimants might proceed before the courts "where such lands are claimed" * * * "by *other* mode of investiture of title thereto in the original claimant, or claimants, by separation therefrom from the mass of the public domain." If a title were not what is known in land law as a formal and complete grant, *nor* a concession, *nor* an order of survey duly enforced, it would not follow that the claimants under it could not sue in the district court. Sufficient, not being one of these, if it were any "*other* mode of investiture of title thereto, in the original claimant or claimants, by separation from the mass of the public domain." Congress here manifested no disposition to stand upon mere questions of form and nicety. It intended to allow suits on the leases of lead mines, in Missouri, the grants of stock ranges, vacheries, and cyprieries in Louisiana, and mill grants, in Florida, provided claimants, at the trial, could show that such were founded on "*written* evidence of title," conformed to the other requirements of sections 1 and 11, and that by the laws, usages, and customs of the country, at the time, they constituted lawful modes of investiture of title in the original claimant, or claimants. And in any given case the ascertaining these facts, whether the claim did rest on written evidence of title, whether such title, whatever its grade or form, was a usual and effective mode of investiture of right in the grantee, and whether the severance was effectual, &c., was all a matter of judicial inquiry appropriate for submission to the judicial tribunals, but not appropriate for the action of commissioners, and Congress. Of all claims which do not, from their nature, peculiarly require judicial action complete and perfect titles are the most obvious. On the other hand, of all claims most appropriately the subject of judicial examination, and equitable adjustment, imperfect and inchoate titles, having no standing in court at any time, and resting only on equity, seem to be the most striking. The courts sit in equity while trying these cases under the act of 1860. Strange if the

very class of titles which rests on equity alone, as against the government, and must be decided by the application of equitable principles, should have been the very class Congress intended to exclude from the equity courts, while submitting to such courts the perfect titles which had never been denied recognition by the government, save for legal and political reasons. (Lynd case, 11 Wallace, 632.)

Congress knew that in Missouri there had never been, with rare exceptions, any titles emanating under France and Spain but imperfect titles. In the Soulard case (4 Pet., 512) the court said, "When Louisiana was transferred to the United States very few titles to lands, in the upper part of that province especially, were complete." And in Menard's Heirs vs. Massey (8 How., 304) it was said, "But two instances are known to exist in Upper Louisiana, where the Intendant was applied to for a complete title and made the same; one case was that of Moses Austin for a league square at Mine à Breton, a report on which is found in 2d Amer. State Papers, 678, and the other perfected title was made to Mr. Reigh in the neighborhood of St. Louis." In the debate on the act of 1860 in the Senate, Mr. Polk, of Missouri, said, "of the vast amount of lands in upper Louisiana at the time of the acquisition of that territory, there were not more than five perfect titles in all Upper Louisiana, including both the States of Missouri and Arkansas." (1st Sess., 36th Cong., May 11, 1858.) And the last Missouri board of commissioners, under the acts of 1832 and 1833, enlarging upon this head say, (8 State Papers, 21,) "To perfect these incomplete titles it was necessary for the parties interested to forward their concessions, together with plats and certificates of survey, to the Governor or Intendant General, at New Orleans, who alone was competent to give the titles in form. The difficulty and expense of procuring a survey; the great distance from Upper Louisiana to New Orleans, together with the large amount which it cost to get a title completed; the scarcity of money among the settlers at that early day; and last, though not least, the indulgence uniformly extended to the inhabitants of the provinces by the French and Spanish Governments; all combined have, in the opinion of the board, rendered the grantees generally too supine to take the necessary steps to procure perfect titles.

The confidence and security which the ancient inhabitants of Upper Louisiana had in those incomplete titles is strongly evi-

denced by the fact of so few being perfected even among those who had been in possession under their grants from twenty to forty years previous to the change of Government."

In land law the terms "grant," and "concession," when used with reference to Spanish and French colonial transactions, are generally synonymous, (Mitchell vs. the U. S., 9 Peters, 733; U. S. vs. Clark, 8 Pet., 450; Strother vs. Lucas, 12 Peters, 436, 449; see also 8 Peters, 466–7; 9 Pet., 152-170; 10 Peters, 331–40.) They were so employed by Congress in Section 1 of the Missouri act, of 26th May, 1824, (4 Stat., 52,) and by act of 17th June, 1844, (5 Stat., 676,) reviving it, and applying it to Louisiana, and parts of Mississippi, and Alabama. It is fair to think Congress used them in this sense in the act of 1860. Now although "a grant" and "a concession" are the same things, unless the context suggests distinction in any given case, yet no one will say that "a complete grant" is the same as "a concession," much less that both, or either, mean, or means, the same thing as "an order of survey duly executed." Yet these are the three specified kinds of title which section 11, read alone, without light borrowed from section one, says may be sued on. Moreover, section 1, of the act of 1824, which act is the parent of the act of 1860, declares that such terms embrace inchoate titles alone. Its words are, "any French or Spanish grant, concession, warrant, or order of survey legally made, granted, or issued, before the 10th March, 1804, by the proper authorities," &c. It is clear they were so intended from the rest of the language: "and which might have been perfected into a complete title." &c. And such was the view this court took in all the cases which came before it under the act, and the subsequent acts reviving or applying it to Arkansas, Louisiana, Alabama, and Florida, (Abbot's Nat'l Dig., 238, § 32; U. S. vs. Reynes, 9 How., 127; cases cited by court in U. S. vs. Lynde, 11 Wallace, 632.)

If, then, Congress, in section 1, of the act of 1824, thought the words above quoted appropriate for describing incomplete and imperfect titles, how are we to escape the conclusion that Congress meant the same thing in using similar words in section 11 of the act of 1860? Analogy affords no room to doubt that Congress meant to give the courts jurisdiction of inchoate and incomplete titles, by section 11, provided such titles conformed to the other requirements of the section. Acts of Congress providing confirma-

tion by courts or commissioners, or both, of claims to land growing out of the treaties of 1803, 1819, and 1848, by which we acquired Louisiana, Florida, and California, are acts *in pari materia*.

Now, it is a rule needing no citations, that such laws are to be read as one statute. (Ryan vs. Carter, 3 Otto, 84; Patterson vs. Winn, 11 Wheat., 335.) If, therefore, in such of those laws as had, before the act of 1860, conferred jurisdiction on the courts to decide such claims, we find that incomplete titles were always submitted to the courts, how are we to justify the sudden change of policy the defendants now impute to the act of 1860?

The Missouri act of 1824, section 1, as we have seen, was always held, by this court, to embrace only such grants as required some act of Spain or Florida to give them completeness. It was decided not to embrace complete titles. And when, by the act of 17th June, 1844, the act was revived and applied to Louisiana and parts of Mississippi and Alabama, it was a subject of great disappointment to claimants under perfect titles there. A number of them sued, but as often as appeals came here they were defeated, for the reason that the act did not intend to submit to the courts *any but* incomplete grants. (Lynde case, 11 Wall., 632; Reynes' case, 9 How., 127.) This is history. The Missouri act of 1824 was applied to Florida by sec. 6 of the act of 23d May, 1828, (4 Stat., 284,) and again by section 4 of the act of 26 May, 1830, (4 Stat., 405.) There never was any question that under these acts *de jure* titles, whether patents, grants, requettes, concessions, or orders of survey, were subjects of judicial cognizance. (Perchman's case, 7 Pet., 51; Clark's case, 8 Pet., 436; Huerta's do., 488; Mitchell, 9 do., 711; Arredondo, 6 Pet., 691; and the mass of the Florida decisions.)

Coming down to the California act of March 3d, 1851, (9 Stat., 41,) we find (sections 8 and 14) that, like the Louisiana, Florida, and Missouri acts, it contemplated judicial action upon inchoate grants; but, unlike the Missouri and Louisiana acts, embraced also complete and perfect grants, which required no further act on the part of Mexico or Spain to complete them. (Sutherland's case, 19 How., 364; Fremont case, 17 How., 542; Ritchie's case, do., 525; and other California cases.) In view of this legislation, which was in the eye of Congress when it passed the act of 1860, an interpretation of section 11 which must impute to that body a total change of policy in so short a time ought not to be adopted, unless the

words will sustain no other meaning. (Morton vs. Nebraska, 21 Wall., 669.) But so far from this being the case, we think we have shown that the language is too plain for doubt, and needs no analogies or explanations to make it clear.

Who can invent reasons why claimants in Missouri, Arkansas, Louisiana, Mississippi, Alabama, and Florida, by virtue of titles incomplete, under France and Spain, from which powers the United States had acquired the territory, embracing such States, by treaties creating the political obligation to perfect such grants as those nations would have perfected, should be allowed the benefit of trial in open court with all its advantages, with right of appeal to this court to test the validity of their pretentions; that this should go on from time to time, from 1824 to 1849, and yet that, after 1860, the same class of persons, in the same States, claiming under similar titles, originating under the same foreign sources, and secured and protected by the same treaties, should suddenly be told that, although the courts are open to some claimants, they are no longer open to them? In a late case the district court for Louisiana and this court maintained jurisdiction, (McMicken case, 7 Otto, 204,) and both decided it on the merits, never doubting the right so to do under the 11th section, although the title sued on was a mere order of survey never executed, and having no other elements of a perfected grant. Nay, at the last term this court confirmed an incomplete grant for four superficial leagues, never doubting its jurisdiction of the claim. We refer to U. S. vs. Perot, (8th Otto, 429.) This claim was founded on an equity, an inchoate title, emanating from the Spanish commandate of a small interior post in Northeast Texas, as held by Spain, and was, like the titles confirmed in the cases of U. S. vs. Davenport, (15 How., 1,) and U. S. vs. Patterson, (do., 15,) an incipient grant, and not a perfect one. Had not the titles in those cases been incomplete, the courts could not have taken jurisdiction under the act of 1844, which was distinctly announced by the court at the time.

We admit that if the Clamorgan title does not come within the rule of severance adopted by section 11, it cannot be *confirmed* by this court. And we think section 11, and *number three* of section 3, unite in the same rule of severance. But that is matter for trial on the merits; should it turn against us it would show the grant bad, from indefiniteness, a frailty common to descriptive grants, not that the district court had no jurisdiction of the case.

The petition in the district court is the only test of its jurisdiction, (Arredondo, 6 Peters, 709.) If its averments present a case within the act, and on demurrer, as in our case, the law is held to be with the claimant, the court has jurisdiction notwithstanding at the trial the averments may fail of proof. In such case the decree would be one of dismissal. But from *any* decree adverse to the claimant he may appeal, (section 11,) and the trial here, being *de novo*, we stand unaffected by anything done in the court below. True, the questions raised by the general demurrer of the government, (record 9) in the district court, must be passed on here, but, as the petition must be taken as true for that purpose, the only question is one of law, and not of fact. If this court holds the demurrer well taken then the decree would be one of dismissal without reference to the merits, and it is only in such an event that it could appear the district court erred in assuming jurisdiction. But it is too clear that our petition is sufficient under the act, and that the demurrer here must also be overruled. If this be so then no question of jurisdiction can arise upon any other part of the record. Such questions can only go to the merits.

But we are far from admitting that our title is imperfect, and inchoate, save in the mere technical sense. In other words, we think it was substantially a perfected and completed grant, at the date of the treaty of 1803, under the laws, usages, and customs, in force in the Province of Louisiana, at the time, and required no other or further action by the colonial authorities to give it the effect of an executed contract. If the court so believe, then the preceding argument will have been unnecessary. But, as this is a question going to the validity of the title, we defer further remarks on this point for the part of this brief devoted to the merits.

ON THE MERITS.

The important questions upon the merits, arising upon the record, seem to be:

I. (a): *Were the instruments here sued on executed by the competent authorities, prior to cession, and is the evidence thereof satisfactory?*

I (b): *If so, do those instruments make a title valid against the defendants according to "equity and justice, and the principles" of the act of* 1860*?*

II. *If they were so executed, and if the proof is satisfactory, and the title is valid by the rule referred to, then are the appellants,* HENRY CLAMORGAN, LEON A. CLAMORGAN, *and* JULIUS CLAMORGAN, *the legal representatives of the Spanish grantee, and, as such, entitled to a decree of confirmation?*

I. (a.) *Were the instruments here sued on executed by the competent authorities, prior to cession, and is the evidence thereof satisfactory?*

The instruments referred to are,

First, Clamorgan's petition, of March 1st, 1797, asking the grant;

Second, the decree of concession of the Lieutenant Governor, Don Zenon Trudeau, of March 3d, 1797, granting the same;

Third, the confirmation of the grant by the Governor General, the Baron de Carondelet, of 5th April, 1797, proved by letter from the Lieutenant Governor, to Clamorgan, of July 3d, 1797.

These writings were by Clamorgan exhibited to the Board of Commissioners authorized to examine and record them, and to report upon his claim, under the act of March 2d, 1805, (2 Stat. 324, § 4. This fact is proved by the record, (131–132,) and by State Papers, (Vol. 2, p. 629; and Vol. 8, p. 233.) It is also proved by the copies and translations of the same instruments given by the recorder, at St. Louis, on June 3d, 1876, his certificates testifying that such copies were faithfully made "from the record of the old board of land commissioners, appointed under the act of Congress of March 2nd, 1805," then in his custody, (record 126, 128 and 129.) The State Papers relating to Public Lands were made evidence by stipulation, (record 170.) The commissioners, under the act of 1805, were supplied with clerks, (section 5,) with law agents to guard the interests of the government, (section 6,) and with translators of the French and Spanish languages. Original title papers, therefore, submitted to their inspection, and admitted to record by them, without suggestion of forgery, or any question of their genuineness, must be looked upon, now, as beyond question. The act of 1860, section 7, implies this. We think it as clear as proof can make it, therefore, that the instruments were executed by the persons who appear to have executed them. Carondelet's confirmation may rest on different grounds as to proof. It seems to have

been conveyed in the original by letter from the Governor General to the Lieutenant Governor, of date the 5th April, 1797, (record 129,) in reply to what must have been an official report upon the facts and motives of the concession. It was communicated to the grantee, by letter from the Lieutenant Governor, of July 3d, 1797, (record 129,) in which the sentence of ratification is extracted by quotation marks from the original. And the only question as to the genuineness of this sentence, if such can now arise, depends upon the respect due Trudeau's letter repeating it to the grantee. He was the custodian of the original, and hence, on principle, (Perchman's case, 7 Pet. 51,) could have given certified copies admissible as evidence. He did not certify a copy, nor even an extract. But we think the high office he held gave his mere statement of the fact, over his own signature, the weight of a formal certificate. Besides, he evidently intended it to be regarded as of equal weight with the original from the language in which he ends his letter, "I transmit the same to you for your knowledge and government." And, as this was a part of the transaction begun by the Lieutenant Governor, and as forms were then mostly unobserved in Upper Louisiana, in granting lands, we think, as the last act in the creation of the title, it should be received now as proof of what it declares. It never was denied this effect. No board of commissioners, no recorder, no committee of Congress, seems ever to have hesitated about the mode in which the Governor General's ratification of the grant was proven before them. (2 State Papers 629; record 131, 132, 139, 140.) The board of commissioners, under the acts of 1832 and 1833, with all their bias against the grant, admitted the genuineness of these papers, and that there never had been a suspicion raised against them. (8 State Papers, 22.)

We think it reasonably clear, then, that Don Zenon Trudeau, when Lieutenant Governor of upper Louisiana, under Spain, did make the concession to Clamorgan, and that the Baron de Carondelet, when Governor General under Spain, did ratify and approve the same, and that both did so before the treaty of April 30th, 1803.

The next inquiry is, were such officers "the competent authority" as meant by section 11 of the act of 1860?

The act of 1824, section 1, had it "the proper authorities," and

the 8th article of the Florida treaty, of 1819, had it "his majesty's lawful authorities." Congress must have meant, by the words, in the act of 1860, what the treaty and the act of 1824 meant by similar words. What they meant is settled in Mitchell vs. U. S., (9 Pet., 734;) in United States vs. Clarke, (8 Pet., 451 and 448;) in Strother vs. Lucas, (12 Pet., 438;) in Smith vs. United States, (10 Pet., 331;) and in other cases this court held that these words referred to such governors, lieutenant governors, intendants, subdelegates, &c., as *exercised*, from time to time, the power of granting land in Florida, or Louisiana.

What officers did exercise this power, in those two provinces, is settled by the body of the land laws, and the decisions of this court affecting titles under them. We cite only a few of the leading cases: Arredondo case, (6 Pet., 691.;) Mitchell's case, (9 Pet., 711;) Delassus case, (9 Pet., 117;) Choteau's case, (9 Pet., 137;) Stoddard vs. Chambers, (2 How., 284;) Menard's heirs vs. Massey, (8 How., 293;) Bissell vs. Penrose, (8 How., 317.) The question is now no longer an open one.

Hence we conclude that the Lieutenant Governor, and the Governor General, were the "competent authority" meant by the act of 1860. If this be so, then we have only to show that Zenon Trudeau *was* such Lieutenant Governor on March 3d, 1797, when he granted the concession, and that the Baron de Carondelet *was* such Governor General on the 5th April, 1797, when he confirmed it.

Carondelet's commission or appointment bore date the 17th March, 1791, at Madrid. (2 Recopilacion, 455–459.) He remained in the government later than March or April, 1797. (Martin's History of La.) On the 20th June, 1797, he granted thirty superficial leagues to Maison Rouge, and on 27th of the same month and year made the enormous grants to Elisha Winter and sons. The fact that he was Governor at those periods has never been questioned. (U. S. vs. King, 7 How., 857; also Report of the Committee of House of Representatives, 22 March, 1832, 6 State Papers, 426.)

Zenon Trudeau was Lieutenant Governor before and after the grant to Clamorgan, viz., March, 1797, and this has been recognized by the court in numerous decisions, among them are Delassus vs. U. S., (9 Pet., 130;) Choteau's Heirs vs. U. S., (9 Pet., 151;) Soulard's Heirs vs. U. S., (10 Pet., 100.) This will also abundantly appear from an examination of the mass of claims reported

by the first and last boards of commissioners for adjusting land claims in Missouri, to be found in the State Papers, (vol. 2, p. 629; vol. 6, pp. 703–901; and vol. 7, pp. 773–907.)

Indeed, it cannot now be regarded as an open question that Carondelet and Trudeau were, respectively, Governor General and Lieutenant Governor at the dates when they respectively granted and ratified the titles before the court. We pass, therefore, to the next point.

I. (b)—We have now to inquire with reference to those instruments thus, we think, shown to have been executed "by the competent authority prior to cession."

(b.) "*Do they make a title valid against the defendants according to 'equity and justice, and the principles' of the act of* 1860?"

And first, as to the authority of the colonial officers of the king of Spain to make the grant.

In the Florida cases of Arredondo, (6 Pet., 691;) of Clarke, (8 Pet., 452;) of Perchman, (7 Pet., 95;) and other cases from that State, this court held that the authority of these officers to grant the domain lands was not to be doubted. In the Perchman case the court said, (p. 94,) in reply to the point made by the government, that the grant itself suggested want of power to make it: "Papers translated from a foreign government respecting the transactions of foreign officers, with whose powers and authorities we are not well acquainted, containing uncertain and incomplete references to things well understood by the parties, but not understood by the court, should be carefully examined before we pronounce that an officer holding a high place of trust and confidence has exceeded his authority." In Arredondo, (6 Pet., 722,) the court say, "In their whole legislation on the subject (which has all been examined) there has not been found a solitary law which directs that the *authority* on which a grant has been made, under the Spanish Government, should be filed by a claimant, recorded by a public officer, or submitted to any tribunal appointed to adjudicate its validity, and the title it imparted. Congress has been content that the rights of the United States should be surrendered and confirmed by patent to the claimants under a grant purporting to have emanated under all the forms and sanctions of the local government. This is deemed *evidence* of their having been issued by lawful, proper, and legitimate authority, when unimpeached by proof to

the contrary." * * * "The United States were too just (p. 724) to exact of the grantees of land, under an absolute colonial government, what no court requires from one who holds lands under the grant from the United States, or of a State, fully executed." * * * "It is thus clearly evinced (p. 726) by the acts, the words, and the intentions of the legislative that, in considering these claims by the special tribunals, the *authority* of the officer making the grant, or other evidence of claim to land, formed no item in the title it conferred—that the United States never made that a point in issue between them and the claimants *to be even considered, much less adjudicated.*" * * * "The grants of colonial governors (p. 728) before the revolution have always been, and yet are, taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands." And, in conclusion, the court said, (p. 728:) "Taking, then, as a *settled* principle that a public grant is to be taken as evidence that it issued by lawful authority, we proceed to consider, &c." In that case a grant of 289,645 acres had been made, and the United States pleaded want of authority in the colonial officers to grant so much.

In the Clarke case, (8 Pet. 436,) a mill grant of 16,000 acres had been made, and the defence there was also excess of authority by the colonial officers. The court said, in reply, "It has been already stated (p. 452) that the acts of an officer to whom a public duty has been assigned by his king, within the sphere of that duty, are *prima facie* taken to be within his power. This point was fully considered and clearly stated by this court in the case of Arredondo. And the principles on which the opinion rests are believed to be too deeply founded in law, and reason, ever to be successfully assailed. He who would controvert a grant, executed by the lawful authority, with all the solemnities required by law, takes upon himself the burden of showing that the officer has transcended the power conferred upon him, or that the transaction is tainted with fraud."

In Makey vs. U. S., (10 Peters, 340,) the court said, "In repeated decisions we have affirmed the authority of the local governor to make grants of land." And so on through the mass of adjudications, upon claims arising under grants from the French and Spanish colonial authorities, in the old provinces of Louisiana and Florida. Counsel will not dwell longer on a point they consider settled.

The answer of the government nowhere puts in issue the authority upon which the grant issued in this case, nor (thus impliedly admitting the authority,) does it anywhere allege that the quantity exceeded the general power to grant. However, though the objection as to extent of the lands was not raised in the court below, and may not be here, we are in no wise apprehensive on the point. The question may be an ingredient in the *validity* of the title which we are now discussing, and hence we cannot pass it unnoticed.

The history of the case, given in the "statement," shows that Clamorgan did not solicit, nor the authorities intend to grant, a narrow and illiberal indemnity. His losses were admitted to have been great, for those times, and his services to have been valuable, and both are referred to as the chief motive for the grant. There is some confusion, not to say contradiction of proof, as to how much money was really due him by the king, or, indeed, whether any at all was due, merely on account of the building, arming, and manning the company's forts. We pass that by now. What we wish to call attention to is that much had been lost, spent, and done, for the king, and that much was expected to be given as indemnity to him who had spent, and been spent, in his service. In his petition Clamorgan says, after reciting the services he had been about, "Those objects could not be obtained but by making great sacrifices among the Indian nations, in order to conciliate to us their esteem and friendship. In consequence of your recommendations, sir, his excellency, the Baron de Carondelet, laid before his Majesty an account of the excessive expenses to which petitioner had been subjected, in this arduous enterprise of facilitating communications then so extensive. His Majesty, in his goodness, determined, in favor of the petitioner, that a sum of ten thousand dollars should be paid annually to him, in order to contribute to the expenses occasioned by the discovery of the nations and the territories of upper Missouri, as, also, in keeping away foreigners who, from Hudson's Bay and Lake Superior, transported their goods in order to bribe the credulous nations inhabiting the said upper Missouri. His excellency, the Baron de Carondelet, as well as you, sir, communicated immediately, by official letters, to the petitioner the generosity of His Majesty in his favor; but it had not its intended effect on account of the impediments thrown in the way by the intendant, Morales, who pretended at the time to

have in the king's coffers no funds appropriated to that object. In consequence of that state of contradiction between the two powers the petitioner has remained a victim to his zeal and activity, in rendering himself useful in compliance to the wishes of the general government and to the intentions of His Majesty," (record 126–7.)

This language was addressed to the Lieutenant Governor, and, although blunt in telling the wrongs of the old pioneer, it must be taken as evidence of all he related. The officer to whom it was addressed, and who must have been excellent authority as to its truthfulness, seems, in the first part of his decree of concession, (record, 128,) to have been satisfied of the truth of the statement. He says: "Cognizance being taken of the statement made by Don Santiago Clamorgan and the Governor General, the Baron de Carondelet, having particularly recommended to me to facilitate and protect the discovery and commerce of Upper Missouri, in which the above-named Clamorgan has engaged at my entreaties; considering the losses which said enterprise has occasioned to him, and the new expenses to which he shall have to contribute on account of the same undertaking, and how important it is to favor and extend the discoveries, hereinbefore mentioned, without prejudice to the royal treasury, and to the interest and welfare of those settlements, but, on the contrary, in contributing to their prosperity by drawing new inhabitants; for these considerations, and on account of the said Clamorgan having rendered himself worthy and deserving of the favors of the government," &c. Thus adopting and referring to the petition, and, in the subsequent part of his decree, making its descriptive terms the rule by which the surveyor was to make his survey, he made it a part of the grant, and gave it the highest sanction as a true recital of all material facts. The land to be surveyed, and hence the land granted to Clamorgan, was described by the concession to have the "extent" * * * "he solicits, in the way and manner described in the foregoing document," &c. By whatsoever description the grantee had, therefore, described the lands solicited, by that description was the grant made. (Smith vs. U. S., 10 Pet., 326; U. S. vs. Sibbald, 10 Pet., 322; Blake vs. Doherty, 5 Wheat., 359; Stringer vs. Young 3 Pet., 320; Boardman vs. Reed, 6 Pet., 328.)

Now, waiving at present all argument as to the mode of location to be adopted by this court, we wish here to show that the appli-

cant prayed for and expected a tract of land whose extent and monopolies might, in some degree, compensate his losses and services. After describing the three tracts with uncommon care, the first being "*the* tract bounded on one side by the little river called La Charette, alias Dardenne, and on the other by the little river called Au Cuivre," which streams were to bound such tract, respectively, on the south and north sides; the second to be a tract south of, and bounded north by, the little river called La Charette, fronting sixty arpens on the Mississippi; the third to be a similar tract north of, and bounded south by, the Cuivre river, and fronting sixty arpens on the Mississippi; after thus sufficiently setting forth what he wished, the claimant ventured to add a mode of ascertaining the back line by theoretical courses and distances. He concluded thus: "The said lines encompassing in their extent all the waters of the above-mentioned rivers La Charette, alias Dardenne, and Au Cuivre, in order that, hereafter, the petitioner may erect saw and grist mills thereon, also place there a number of cattle, have slaughter-houses, and send salt meat to the capital." Considering the distance from each other of the streams La Charette and Au Cuivre, and the distances to which they penetrate the interior region to the west, (shown by the plans E and F,) agreed to truly represent such facts, (record, 169,) that the petitioner desired a grant of their banks throughout their entire lengths, with proper timber supply on each bank of each stream, in order that he might build mills, and exclude others from competing with him or molesting him in any way, we must conclude that a very large extent of territory was intended. Clamorgan described it finally as a tract which would encompass in its extent all the waters of those two streams, in order that he might have a large field for his operations, among which, and probably the leading one, was to be the building of "saw and grist mills thereon," viz., on all the waters of said streams.

No survey having been made we find, as was natural, that in the subsequent history of the grant its extent was matter of mere conjecture. But it is noticeable that no one ever attributed to it an extent of *less* than 448,000 arpens.

In the notice of claim before the board of commissioners, under the act of 2d March, 1805, (Record 131,) Clamorgan claimed *three* tracts; the central tract being the one between the rivers, which he says contains five hundred thousand arpens. The lateral

tracts he does not estimate. They could not have contained, each one, less than about 20,000 arpens, or both about 40,000 arpens. So that by any rule of location Clamorgan claimed, before the board, for his central grant, 500,000 arpens, and, for the two lateral grants, about 40,000, or for all three together, about 540,000 superficial arpens.

On 14th November, 1811, (Record, 131,) the board considered the claim, and they treat the central one as 500,000 arpens, but impute no area to the other tracts. When the same title was before the last board, acting under the act of 1832, they took some testimony in the case, (Record, 139, 140, and 141,) which shows the lands were popularly regarded as of great extent; one witness stated, "embracing a great portion of the lands lying in the fork of the Missouri and Mississippi." And again: "This affiant understood the land was about 500,000 arpens," &c., (Record, 140.)

When the grant was sold by the grantee, in 1813, to Tholozan, he described it as a "tract of land containing 448,000 arpens in area." (Record, 144.) When Tholozan subsequently sold to the children of Clamorgan he called it a land of 448,000 arpens in superficies," &c., (Record, 148.) In his subsequent sale to Labeaume he calls it "a grant (concession) of land of 448,000 arpens, more or less," (Record, 152.) Congress, in excluding the claim from the courts, by act of 26th May, 1824, section 12, (4 Stat. 52,) describes it as lying between the Missouri and the Mississippi rivers, and covering parts of the counties of St. Charles and Lincoln, in the State of Missouri." This suggests a large extent.

The foregoing, and much more that could be cited, all goes to show that the lands were of vast extent, commensurate, in some degree, with the character and services of the grantee, in keeping with the dignity of the king and his ministers, and calculated to reimburse the losses for which they were given and accepted as an equivalent.

We now will try to show that, whatever the extent of the lands, the power to grant to that extent was vested in the officers of the king of Spain who made the grant in question. We might rest this point on the cases cited in support of the *authority* of the Governor General, and his Lieutenant Governor, to grant in general. For if the exercise of the authority carries with it *prima*

facie evidence of the right to grant in general, principle and analogy will justify the application of the rule to the quantity or extent of the tract granted, throwing the burden of proof, not on those adducing the grant, but on those who would contradict it. However this may be, it is so easy to show that no known limit as to the extent of grants of mere domain lands has ever been ascertained to exist, with reference to the colonial authorities in the Spanish province of Louisiana, that we cheerfully enter upon the inquiry.

Prior to 1735 the viceroys, audiencias, and intendants, of the king of Spain, in his vast possessions in Mexico, in South America, and the islands of the adjacent seas, exercised absolutely the sole and exclusive right and power of granting the domain lands in such dependencies of the crown. By royal order of 24th November, 1735, (2 Recopilacion, 62 and 67,) the king, for the future, reserved to himself the ratification of such grants. But, this working hardships and delays, he abdicated the power of supervision, or control, and, by royal order, of 15th October, 1754, (do. 62 and 67; also reference to Clarke's case, 8 Pet. 452) declared that, for the future, his ministers in such dependencies, should exercise the function free from such supervision by himself. Thus stood the rule, or custom, in the other possessions of the Spanish monarchy when that nation took possession of the province of Louisiana, in 1769, under the treaties, between her and France, of 1762 and 1763. In 1768 the power was taken from the political and military governors and given to the intendants. They were the fiscal ministers of the king in their respective governments, representing very nearly the Secretary of the Treasury in our system. In the year 1770 the Spanish General, Count O'Reilly, having visited and examined the colony of Louisiana, returned to Spain, and upon his urgent advice, the business was taken from the intendants and restored to the governors, (2 Recopilacion, 460.) The Marquis de Grimaldi thus communicates the royal will to Don Louis Unzaga, the Governor General at New Orleans; referring to the advice of O'Reilly, he says, "He considered it would be better, in future that the governor alone should be authorized to make those grants. The king having examined these dispositions and propositions of the said lieutenant general, approves them, and also that it should be you and your successors in that government, only, who are to have the right to distribute (*repartir*) the royal lands," &c.

This language is clear, and apt, and implies no limit upon the discretion of the Governor. And none was ever found by any court, board of commissioners, or committee of Congress. This power resided with the Governor until it was again, in the year 1799, restored to the intendants, (2 Recop. 469–478). The order for the restoration was dated 22 October, 1798, but did not go into effect in the province until some time in 1799.

O'Reilley framed a plan for allotting lands in the province, dated 18 February, 1770, (see White's Recop. 2. p. 228–31). This plan, known as "O'Reilley's Regulations of 1770," is the only system of its kind known to have existed in the province prior to the grant to Clamorgan. On September 9th, 1797, at New Orleans, the then Governor General, Manuel Gayoso De Lemos, formulated a code of eighteen regulations, but that, of course, could not affect the grant in our case. Nor were these regulations ever construed to apply to other persons than mere settlers and emigrants, (White's Recop. 2, 231–233).

Afterwards, on 17th July, 1799, Juan Ventura Morales, the sturdy and faithful intendant, upon the restoration to the intendancy of the administration of the domain lands, published a more elaborate code, containing 38 articles, known as "Morales' Regulations," (2 White's Recop. 234–244).

It was held in Delassus case (9th Pet. 134), in the Choteau case, (do. 153), and especially in Mackey vs. U. S. (10 Pet. 340), that if the regulations of O'Reilley, of 1770, ever extended to Upper Louisiana it was as competent for his successors to make exceptions to, or to disregard, such regulations as it would have been in O'Reilly himself, which latter power was not to be doubted. Hence, if there is anything in these regulations implying, in the opinion of the court, a restriction upon the power or discretion of Carondelet, and Trudeau, to grant largely to Clamorgan, the foregoing authorities ought to remove the doubt.

On the 20 June, 1797, Carondelet granted, under certain conditions, to the Baron De Bastrop, on the Ouachita river, in Lower Louisiana, 144 square leagues, or 829,440 acres, (2 Recop. 405; 2 Amer. State Papers, 772; 4 do. 53). The grant was rejected by this court, in U. S. vs. Philadelphia and New Orleans, (11 How. 610), but only for failure of conditions, not because the governor had exceeded his powers. No intimation is given that he had done so.

On 20 June, 1797, the same Governor granted to the Marquis de Maison Rouge 30 superficial leagues, or 172,000 acres, (2 Recop. 410; 3 State Papers, 463). This title was also before this court in U. S. vs. King, (7 How. 857), when it was declared invalid solely for non-performance of conditions. No allusion is made to want of authority to grant to the extent of the lands claimed.

On 27th June, 1797, Carondelet also granted in one instrument one million arpens, (850,700 acres), to Elisha Winter, and to each of his sons, William and Gabriel, 250,000 arpens, (or 212,675 acres), making 1,500,000 arpens, (or 1,276,050 acres), granted to the three, (2 State Papers 632--'33). These titles were sued on in the District Court of the United States for the Territory of Arkansas, under the act of 17th June, 1844, (5 Stats. 676), and the opinion and decisions of the court, adverse to their validity, appear in Hempstead's Ct. Ct. Reports, 344: 388.

Their great extent raised a question of the power to grant so great a quantity to one person, but the court seems to have been satisfied the right existed (379). It must be borne in mind, too, that these excessive grants to the Winters were pure gratuities, issuing upon the mere consideration of future occupancy and settlement, whereas the grant to Clamorgan, much more limited in extent, was in the nature of a sale, or compromise of acknowledged services and demands.

These claims came before Congress, in 1816, by petition of the heirs of Winter praying confirmation. The Committee on Public Lands, of the House, reported, among other things, "It is as well proven as any fact of the kind can be, that if the Spanish Government had retained the title to this country, the claim, thus conceded, would have been perfected by a complete grant." They then add, "The principal difficulty in deciding in favor of the claims of the petitioners arises from the quantity contained in the concessions." * * * "The committee cannot say, with certainty, as to the extent of the powers of the governors in making grants; they, however, believe that when the grant was simply for land their powers were unlimited. They are of opinion that the concession, so far as it relates to the five hundred arpens square," (250,000 superficial arpens, or 212,675 acres,) "ought to be confirmed to the heirs of Elisha Winter, and that the prayer of the petitioners, as to the balance of the claim, be rejected. They report a bill for that purpose." (3 State Papers, p. 170.) The same

claims came before Congress again, in 1817, when the Committee on Private Land Claims, in the House, made a long and exhaustive report, strongly urging the confirmation of the grants to Elisha and William, but reporting against that of Gabriel, he not having settled and improved it. They report a bill, and say among other things: "Your committee, in the investigation of the claims of the petitioner, have particularly examined into the powers of the Governor General of Louisiana, while the same was a Spanish province, to grant lands for agricultural purposes, and with a view to the population of the country; and there does not appear, to your committee, any ground on which to rest a doubt of his power in this respect. The known laws, as well as the invariable usage of the country, established the right of the Governor, in the case of the petitioner, to make the grant." (See State Papers, Vol. 3, p. 289 to 299.)

The claims were again before Congress, in 1820, when the usual report was made to be followed by the usual failure of Congress to act. The committee strongly urged a bill to enable the claimants to institute a bill in equity, against the United States, but the politicians of that day had the same wholesome dread of a good title, before an American court, as those who, in 1824, bolted the door against Clamorgan, (3 State Papers, 429–30.) Once more the Winters with their chilling demands appealed to the Republic to respect their treaty obligations, and keep faith with an emperor, but all to no purpose. The Committee on Public Lands, of the House, on March 22, 1832, made, on this last appeal, an able and manly report (5 State Papers, 423–429) which is too long to abridge by quotations. We will make but one from page 425: "From the testimony adduced there is not, in the opinion of the committee, any ground on which to rest a doubt of the power and authority vested in the Governor-General of Louisiana to make to one individual a grant of land of one thousand arpens square." That would be a million superficial arpens, or, as stated, 850,700 acres. The committee continues, "It is true that it was unusual for the Governor-General to make so large grants as the concessions to the Messrs. Winter, but it was at the time the policy of the Spanish Government to encourage immigration to the frontiers, and, in the language of one of the witnesses, its generosity and benevolence surpassed the usual method established in other possessions of the Spanish Government. It will also be recollected

that the land in the district of Arkansas, at the time, being situated in a remote and wilderness part of the country, on the frontiers of the province, was estimated at little value." Further on the committee say "That the United States have not the right, under our Constitution and republican form of government, to do that which the monarchical government of Spain, in the plenitude of her unrestrained power, could not have done, *deprive her citizens of their rights;* but that she is bound to redeem the pledge made to the French republic by protecting the claimants in the free enjoyment of their property."

Shortly before we acquired the Floridas the Spanish authorities, to compensate the powerful house of John Forbes & Co. for losses to the amount of $100,000, granted an immense district of country in Florida, estimated by their Surveyor General, Pintado, at 1,500,000 arpens—1,276,050 acres. The Indian tribes who were the immediate debtors and despoilers of the house, (which, like Clamorgan's company, was a kind of prop to the power of the government among the savages,) had precedently ceded their right of occupancy. But Spain alone could annex the fee. And this was done. (2 White's Recopilacion, 352–4.) About 1804 another grant of a similar character had been made to the house of Panton, Leslie & Co. It contained 1,200,000 arpens—1,021,000 acres. (2 White's Recopilacion, 356–8.) Other immense grants were made about the same time to these houses, or members of them, and in no instance has the power of the governors been questioned. In 1835 this latter grant was confirmed by the Supreme Court, (case of Mitchell *et al.* vs. The United States, 9 Pet., 711,) the court stating the doctrine which had prevailed in England, France, Spain, and the United States, whereby the sovereign always exercised the right to grant the fee of lands in Indian occupancy, subject alone to such right of occupancy. (9 Pet., 746.) The decision is a powerful argument for the power in the colonial authorities to grant domain lands without any known limit.

In the Clarke case, (8 Pet., 452,) this court said: "The immense territories held by Spain, affording an almost inexhaustible fund of lands claimed by the crown, could scarcely fail to produce large grants to favorites, as well as a regular system for inviting population into her colonies. The viceroys in New Spain and Peru, who were also governors, possessed almost unlimited powers on this and

other subjects." * * * "No public restraint appears to have been imposed upon the exercise of this power." * * * "In 1735 this power was withdrawn from the provincial officers, but was restored to them in 1754. The royal order of 15th October, 1754, confers this power in general terms, *without any limitation on the quantity or on the consideration which may move to the grant.* It would excite surprise if, in a monarchy like that of Spain, no rewards in land could be granted for extra services, and no favors could be bestowed. Among the earliest laws for the government of America (Wh. Comp., 30) is an order that the viceroys of Peru and Mexico 'grant such rewards, favors, and compensation as to them may seem fit.' A subsequent order, (Wh. Comp., 41,) after directing expensive dispositions of territory, adds, 'all the remaining lands may be reserved to us, clear of any incumbrance, for the purpose of being given as rewards, or disposed of according to our pleasure.' In White's Comp., 29, we find the following law: 'It is our pleasure that services be remunerated where they shall have been performed, and in no other place or province of the Indies.' It would seem that these remunerations, if in land, would be made by the Governor, when empowered to grant them, provided no other officer was designated."

In the Davenport and Patterson cases (15 How., 1 and 12) the court confirmed two imperfect grants made by the mere local commandante, under Spain, of the interior post of Nacogdoches, without survey, one for 92,160 acres, the other for 207,360 acres. (P. 5.) The United States pleaded want of power to make such large grants by a mere commandante, but the court did not question the power.

In Sutherland vs. The United States, (19 How., 364,) the court say, much to the same purpose: "In construing grants of land in California made under Spanish or Mexican authorities, we must take into view the state of the country and the policy of the government. The population of California, before its transfer to the United States, was very sparce, consisting chiefly of a few military posts and some inconsiderable villages. The millions of acres of land around them, with the exception of a mission or rancho on some favored spot, were uninhabited and uncultivated. It was the interest and policy of the king of Spain, and afterwards of the Mexican Government, to make liberal grants of these lands to those who would engage to colonize or settle upon them. The applicant

for land usually accompanied his petition with a map, showing the natural boundaries or monuments of the tract desired. These were usually rivers, creeks, rivulets, hills, and mountain ranges. This court has no discretion to enlarge or curtail such grants to suit our own sense of property or defeat just claims, however extensive, by stringent technical rules of construction to which they were not originally subjected." And in the Peralta case (19 How., 347) the court reviews the substance of prior decisions on the point, concluding that the mere act of an officer in granting lands carries with it *prima facie* proof of the power, and that no limit to that power had ever been affirmatively established or ascertained. These authorities, and they might be extended much further, suffice to show that whatever quantity was granted to Clamorgan it was competent for the authorities to grant.

Having shown, then, that the general authority to grant resided in the officers who made the grant sued on, and at the time they made it, and that whatever extent the lands may have, the matter was within their discretion and power, we now pass to the next requisite to the validity of the title, and that is *severance*. For unless there was a severance, whatever the power to grant or the formal completeness of the muniments of title relied on, there was, in law, no conveyance, because an undefined thing cannot be the subject of grant.

SEVERANCE FROM THE DOMAIN.

This question we think the hinge of the case. The act of 1860 contemplates the confirmation of claims unlocated and unsurveyed. (Sections 1, 6, and 11.) Hence mere want of survey is no objection in itself, either before the commissioners or the courts. Section 11 contemplates confirmation where lands are claimed "by complete grant," or by "concession," or by "order of survey duly executed." It also contemplates confirmation where lands are claimed "by *other* mode of investiture of title," * * * "by separation thereof from the mass of the public domain, either by actual survey *or* definition of fixed natural and ascertainable boundaries or initial points, courses, and distances," &c. The severance need not, therefore, be by "actual survey," for Congress was informed that the mass of incomplete titles, at least in Missouri, had not been surveyed under Spain. (See Reports of Commissioners under

acts of 1832 and 1833, cited in "Statement," and found in 6th State Papers, 703–901; 7 do., 773–907; and 8 do., 20–243.)

Suffice it if severance, in the absence of survey, resulted from the "definition of fixed natural and ascertainable boundaries, or initial points, courses and distances," Section 11 not only recognized what the old decisions under the Missouri, Florida, and Louisiana acts had established, that the grant must define the land because a judgment for an undefined thing could not be enforced; (18 How. 473; 3 How. 786; and the mass of the decisions), but it enumerated, in an order of arrangement significant of long established precedent, not only the different grades of colonial titles, but the different modes by which the lands affected by them might have been separated "from the mass of the public domain." "Complete grants" come first, and we know them to be the highest grade; then "concessions," which generally mean first decrees of the subordinate officers, not yet sanctioned by the governor general; then comes the next lowest order—"orders of survey duly executed;" and finally, and lastly, any other mode of title, aided by severance, which, under Spanish law and custom, was recognized as a mode of "investiture of title" in the grantee. The section meant to say, what we all know, that a survey, by "the competent authority," was the best severance of all. But it also meant to say that, if there had been no survey, then a severance by description was good enough, provided it identified the land. The grant of an island, a prairie, land between two rivers, &c., would be good enough provided the instruments, and other competent proof, identified such island, prairie, or rivers, with reasonable certainty. This is the substance of section 11. It is all it means. Of course the closing part of the section providing, in the event of confirmation patents for the lands in place, and indemnity for those sold, contemplates the previous fixing of limits of the lands sued for. And for this reason we think, and thought, it right for the court below, to order the survey of the Clamorgan grant, and we so prayed. (Record 20). It was not done; why, the stipulations of the parties will explain, (record 169–170). The section even conforms to principle and authority in the very order in which it suggests the mode of severance in the absence of "actual survey." It may result from the "definition of fixed natural and ascertainable boundaries," or, these failing, or wanting, from the definition of "initial points, courses and distances." Principle and

authority justified the subordination of mere courses and distances to natural monuments, in the description of deeds and grants of wild lands. (2 Phillips Ev. 783, and notes; Denn vs. Wright, Peters' Ct. Ct. Reports 64; Cotton vs. Seavy 2 Cal. 496; 3 Washburne's Real Prop. 350, 351, 354, 363, 364, and 347, and 349, third edition). We are thus minute in calling attention to the peculiar language of Section 11 because, we think, Congress intended it with special reference to descriptive, or open grants, like Clamorgan's.

While the act of 1860 was under discussion in the Senate, Mr. Polk, from Missouri, a lawyer very familiar with the subject of Spanish land claims in that State, offered an amendment which became a part of section six. He said: "I wish, also, to add an amendment to that section by inserting, after the word "confirmation," in the fifth line, the words "or where the surveyor general of the district shall ascertain that the same cannot be surveyed and located." The necessity of that grows out of the fact that some of the concessions have been so made that when you come actually to survey them you cannot make a location of them on the ground that would be satisfactory, or would conform properly to the former surveys. I know one instance, particularly, where there was injustice done in that way. There was a call for a natural object, but the original concession was indefinite. The object was a noted spring, but the surveyor general did not know whether to put that spring in the center of the land, as described in the rest of the call, or at a corner, or where, and the location could not be satisfactorily made. It is intended where that is the case, and the confirmation is had, that the party shall have what is called a "float," and shall locate it on other ground not sold by the United States to persons who have entered the land at $1.25 per acre. I will state that these amendments were suggested by the surveyor general of Illinois and Missouri, who is familiar with this subject, and whose opinion I think is entitled to great weight." The amendment was at once adopted without dissent. (See Cong. Globe, 1st Sess. 36th Cong., p. 1479.)

The claim referred to by the Senator was evidently that mentioned in the suit of Menard's Heirs vs. Massey, (8 How. 311.)

As section six applies to claims sued on under section 11, the two must be read together. And so read we submit it as a serious question, entitled to examination, if in a case like the one at bar,

where the judicial admissions of the parties show the suit here is not for lands affected by the grant, but for a "float," a personal chattel, Congress did not intend entirely to waive the former requirements as to severance and identification of the very tracts granted and to submit only the question of title and quantity to the court. The amendment, in the language of its author, was intended to give indemnity lands in just such cases where confirmation was had yet where no location could be made on the ground by reason of meagerness in the calls. Section 6 must be understood as addressed appropriately to the courts, if not only to them. For no "confirmations could be had" through the commissioners, except by final action of Congress upon their reports, and it would seem strange for the Congress of 1860 to be prescribing rules and principles to control the discretion of future congresses when they should come to legislate upon the reports of the commissioners under sections 1 and 2 of the act of 1860. For this reason we think the language of section 6 was exclusively intended for the courts. If this be so, then severance in our case is not an element in the *title* conveyed by Spain, and it should be adjudicated without reference to it. But as to quantity, of course it must be considered, for as to it the parties have not stipulated, though there it will only be looked to as evidence, together with other proof on that point.

Explanation about Plans or Maps.

When the original petition was filed in the district court it was accompanied, (Record, 8), by plan E exhibiting the lands supposed to be contained in the grant, and by statement D, (record, 130), in conformity with the requirement of section 1 of the act of 1860. By first amended petition this plan E, and statement D, were abandoned, (record, 12), and, in lieu of them, there was substituted plan F, and sworn statement G, (record, 13). When the heirs of Labeaume filed their petition, (record, 45), they accompanied it with their own statement and plan. They called the statement D, (record, 59), and the plan E. Both are literal, and exact copies of plan F, and statement G, filed by the Clamorgan heirs. The consolidation of these suits, (record, 31), and the subsequent conveyance by the Labeaumes to the Clamorgans, (record, 154), eliminate their petition, and of course their plan E, from the record. Hence we have only now to deal with the plan

F, of the Clamorgans, as describing the lands we claim. In other words that plan, and it alone, represents the theory of location we think the court should adopt, as descriptive of the tracts granted. The stipulations, (record, 169), explain that our plan F, and the Labeaume's plan E, are copies of each other, and that we rest our cause on them. On the other hand the United States, uncertain what to do, rested their theory, or theories, on *four* plans, H, I, J, and K. The report of the expert, upon the quantities of these plans, (record, 34), shows, what is a fact, that plan H, of the United States, had no back line, and was, in fact, only a foundation on which to draw the other plans I, J, and K. Hence the plans of the Government were, and are, reduced to three in number, viz: I, J, and K; and of the parties complainant now before this court to one, viz: F.

All of these plans came up *in the original* as parts of the transcript, by agreement endorsed on each. Moreover, in the district court, three other plans, marked L^1, L^2, L^3, were filed as evidence by the complainants. They, too, were sent up in the original to this court. But as some of these various plans were too large to attach to the printed transcript, and as there was but one of each it has been agreed, between counsel, that, to facilitate the argument of the case here, and its convenient consideration by the court, such of these plans as are material shall be photolithographed, and reduced in scale, and then stitched into the printed transcript, in their appropriate places. In pursuance of this arrangement the plan E, filed by the Clamorgans, in their original petition, and the plan E, filed by the Labeaumes, were both thrown aside, and all the rest of the plans, above enumerated, were reduced in size, multiplied in number, and thus, by the process referred to, prepared for the use of the court and counsel. They are designated, referred to by the witnesses, by the court below, and by counsel, as—

Plan F—Showing the complainants theory of location, and explained by sworn statement G, (record, 13).

Plan H—Filed by U. S. but defective.

Plan I—Filed by U. S. to describe one of their theories.

Plan J—Filed by the U. S. to describe another theory.

Plan K—Filed by the U. S. to describe another theory.

Plan L^1—Filed by complainants, and certified by Surveyor General of Louisiana.

Plan L^2—Filed by complainants, and certified by Surveyor General of Louisiana.

Plan L^3—" " " " "

Description by the petition.

We now proceed to show that the lands granted are those described in Plan F, which, by the stipulation, is agreed to embrace 675,000 acres. (Record, 169, and 34.)

The Governor, and Lieutenant-Governor, made the descriptive language of the requette their own by referring to it in the grant. (Smith vs. U. S., 10 Peters, 332; Arredondo's Case, 13 Peters, 134; Tameline vs. U. S. Freehold Co., 3 Otto, 663; Friedman vs. Goodman, Circ. Ct. of Cal., 1856, 1 McAll., 142.)

For the purposes of description, therefore, we read it as the act of those officers. Now it must be borne in mind that the applicant asked for *three* distinct parcels of land, and he naturally described the parent, or central tract, first, that being the largest and most important, leaving the subsidiary, or lateral tracts, for the last. He describes the central parcel thus, "In these unfortunate circumstances the petitioner presumes to claim of your goodness that you would be pleased to grant to him, on the western side of the river Mississippi, some leagues above the mouth of the Missouri, *the* tract of land bounded on one side by the little river called La Charette, alias Dardenne, and on the other by the little river called Au Cuiver; one on the south, the other on the north will serve as boundaries to those two sides," (record, 55.) Now the plan F truly represents the rivers referred to, their mouths, sources, and courses, the southern branch of the Cuiver being its main stem for the purposes of this suit. (See stipulations, record, 169.) In the light of this plan, therefore, can anything be more unmistakable than this language of the applicant? It is too clear to hang a doubt on. Had he stopped here, and not endeavored to make clearer what was already wonderfully clear, no one could ever have doubted what tract was intended. The decisions, nay common sense, would suggest to any surveyor that to survey such a tract he could only have to run a right line from the head spring of one stream, to the head spring of the other, and that such would be the back line of the tract; the front being the Mississippi, the south boundary being La Charette river, and the north boundary being the Au Cuiver. But he did not stop here. He

wished to control and monopolize *both* banks of each stream which was to bound his main possession on the south and north sides. This was in order to give him a good supply of timber, on each bank, an uninterrupted right to such streams, with a view to logging facilities, building dams, &c., and the right to select mill seats at any points, and on either bank of such streams. Hence he went on to describe two other separate tracts divided from the first by the rivers referred to. Having defined them as accurately (at least in the surveying parlance, and technical terms of those times,) as he had described the central grant, he ventures to suggest a mode by which the surveyor might ultimately fix the back line of all three tracts. He says, "The depth of the three different above described tracts of land to be extended by two lines starting from the banks of the Mississippi, one from the most northern point, (of the front,) of the above demanded tracts, which two lines shall be run parallel, on each side, in a westwardly direction, until they reach the top of the high hills in the rear, and from there the said two lines to be continued and prolonged, in the same westwardly direction, until they reach a point at the distance of about two hundred arpens from the foot of said hills; and then those two extreme points shall be connected together by a straight line which shall be run so as to form a fourth side of the said three tracts here above demanded. The said lines encompassing in their extent all the waters of the above-mentioned rivers, La Charette, alias Dardenne, and Au Cuiver, in order that, hereafter, the petitioner may erect saw and grist mills thereon, also place there a number of cattle, have slaughter-houses, and send salt meat to the capital."

Clamorgan, before furnishing this rule for fixing the back line of the three tracts, had already described three separate tracts of land adjacent to each other and forming a compact whole. He had in the plainest way, "by definition of fixed, natural, and ascertainable" and now ascertained "boundaries," told the Lieutenant Governor what land he wished. He had fixed the Mississippi river to be the front on one side, a line drawn parallel with, and sixty arpens to the south of, La Charette to be a second side; a similar line to be drawn parallel to, and sixty arpens to the north of, the Au Cuivre to be the third side. He then, as stated, tries to show how the surveyor may, in time, ascertain the only remaining side, "the fourth side of the three tracts here above

demanded." It must be borne in mind that, when he thus employed this superogatory description by definition of "initial points, courses, and distances," he had sufficiently defined the three sides of his land, viz., the east, south, and north sides. This is important. When, therefore, he says that the two points in the rear are to "be connected together by a straight line which shall be run so as to form the *fourth* side of the said three tracts here above demanded," he intends that such fourth line shall not affect the front and side lines already settled. Now, the lower side line of the middle tract, we have seen, had been laid down as La Charette, or Dardenne, and the upper side line as the Au Cuivre, from their mouths to their sources, "one on the south, the other on the north, will serve as boundaries to those two sides." Nothing could be plainer. Carondelet's confirmation can't make it so. Clamorgan had also described the upper and lower lateral tracts with equal precision, but in a technical way. They were to have each a front of 60 arpens on the Mississippi, and to extend up said rivers Dardenne and Au Cuivre, with the same width, to their sources. Carondelet makes this clear if there could have been a doubt about it before. He says: "*The* tract of land situated *between* the two rivers Charette and Cuivre, both emptying into the Mississippi; *also sixty arpens to the north and sixty arpens to the south of said rivers, which serve to determine the situation* of said land, having the Mississippi in front." Now, unless these side grants extend as far in the interior as the streams did, such streams would not "determine the situation of said land" as the Governor said they should. Now, it is too plain the *central* grant at least was to extend to the sources of the rivers named. And it is plain enough that the side grants were to extend into the interior as far on each side, as the central grant on such side. Else how could the streams fix the situation and limits of all three? This, then, was the status (so understood by the Governor Generals) when Clamorgan added to his petition the rule for the operation of the surveyor, when he should survey the land. And here the question arises, Do not these attempts at fixing the rear line by "definition of initial points, courses, and distances," so conflict with the prior description of the lands, "by definition of fixed natural and ascertainable boundaries," as to justifiy the court, under the rules, in discarding such courses and distances, and proceeding to locate the lands by the safer and more unerring reference to the natural monuments? We think the

court will be so justified—nay, we think, under the decisions, it is the duty of the court to so locate the lands. We hold that section 11, of the act of 1860, requires us to ignore the theoretical lines and courses, about which the applicant was not to be misled, and by which we now know he was ~~apt~~ misled, and to adhere to the everlasting and notorious natural monuments which we must presume he had examined, which have never changed, and never can change, and about which he could not have been mistaken. Section 11, by the very order of the arrangement, in its different modes of locating unsurveyed claims, tells us, what authority and reason had long established, that conjectural lines and courses must be subordinated to well-known natural monuments. Suppose the petition, concession, and confirmation contained no recitals of courses and distances at all, can any one say that the other recitals would not then afford one of the most remarkable instances of accurate description to be found in the whole history of Spanish and French descriptive grants? We challenge the government to produce from the Florida, Louisiana, Missouri, and California cases a single instance in which the lands have been so well defined as they would then have been in this case. There would, then, have been absolutely not an element of doubt what lands were meant.

Can there be a doubt what lands Clamorgan meant when he said, "*On the western side of the Mississippi*, some leagues above the mouth of the Missouri, *the tract of land bounded on one side by the little river, called La Charette, alias Dardenne, and, on the other, by the little river, called Au Cuiver; one on the south, the other on the north, will serve as boundaries of those two sides.*" This language is simple and exact. A volume could not have made it plainer. That it describes all the land situated between the two small rivers named, fronting on the Mississippi and extending back to their headwaters, can admit of no doubt. In Doddridge vs. Thompson, (9 Wheat., 469), this court said, "Land lying between two rivers means all the land between the two, from headwaters of one to headwaters of the other." By act of cession of 1 March, 1784, of her northwestern territory, Virginia reserved the tract lying between the Scioto and the Little Miami, in the state of Ohio; (Laws, Opinions, and Instructions, Part 1., p. 587). The language of the reservation is this, "That in case the quantity of good land on the south and east side of the Ohio, upon the waters of the Cumberland river, and between the Green river and Tennessee river, which

has been reserved by law for the Virginia troops, on Continental establishment, should from the North Carolina line bearing in further upon the Cumberland lands than was expected prove insufficient for their legal bounties, the deficiency should be made up to the said troops in good lands to be laid off between the rivers Scioto and Little Miami, on the northwest side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia."

It became necessary to survey the back line of this reservation, all the others being regarded by the Virginia Statute as fixed natural monuments, viz: the Ohio in front, the Scioto above, and the Little Miami below. On 22 April, 1803, Albert Gallatin, then Secretary of the Treasury (Laws, Opinions, and Instructions, part 2, 778), thus instructed the Surveyor General, "And as it is proper that the lands lying west of the Virginia reservation, and above the Great Miami should also be surveyed, *I wish the western boundary of said reservation to be ascertained by running and marking a straight line from the head spring of the Little Miami, to the head spring of the main branch of the Scioto.*" But in running the line the Surveyor, starting from the head spring of the Little Miami, mistook the course to the head spring of the Scioto, and on nearing the main stem of the latter river, and perceiving his error, he discontinued the line before reaching the stream.

This was known as Ludlow's line from the name of the surveyor.

By act of Congress, 23rd March, 1804, (2 Stat. 274) this erroneous line was directed to be *continued* to the Scioto and thereafter to be regarded as the proper one unless Virginia, in two years, signified her dissent. This she did. Congress then, by act of 26 June, 1812, (2 Stat. 764), provided that commissioners, representing the United States, should meet such as Virginia might send, and that they should proceed to run a new line as contemplated by the act of cession. But the act, (Sec. 4.), provided that until this new line was finally fixed, and agreed to, the old line of Ludlow should be held to be the true and lawful boundary. The commissioners ran the line by their Surveyor Roberts, subsequently known as Robert's line, but it was not satisfactory to Virginia, and hence, under the act, the old erroneous line remained the lawful one, there being a broad strip of territory between them. Out of this state of facts arose the case of Doddridge vs.

Thompson, (9 Wheat. 478), in which Chief Justice Marshall said, "the commissioners of the United States were met by those of Virginia, and they proceeded *to ascertain the sources* of the two rivers, and employed a Mr. Charles Roberts to survey and mark a line from the *source* of one to that of the other. The Scioto is a much longer river than the Little Miami, and the defendant has suggested that the country reserved may be limited by the Ohio on one side, and a line drawn from the source of the Miami *to the* Scioto, which shall be parallel with the Ohio on the opposite side. But this suggestion has not been pressed, and the idea it conveys is directly opposed to the words of the reserve, and the construction which has been uniformly given to the deed of cession by both the contracting parties. *The territory lying between two rivers is the whole country from their sources to the mouths,* and if no fork of either of them has acquired the name in exclusion of the other, the main branch to its source must be considered as the true river. Any other rule would be arbitrary, depending on caprice, not on principle; and the whole legislation of Congress upon the subject shows, we think, a disposition to be guided by this reasonable rule."

Compare the inexact language of the Virginia reservation with that quoted from Clamorgan's petition describing the central tract between the rivers, La Charette and Au Cuiver, and if the court entertained no doubt that the former embraced *all* the land between the two streams, from their mouths to their sources, how can it entertain a doubt that the latter should embrace *all* the land between the Cuiver and Dardenne from their mouths to their sources? It may be replied that the language might apply to a much smaller tract than the *whole* tract situated between the rivers; that of a tract fronting on the Mississippi, and extending from the Cuiver above to the Dardenne below, and with a depth of only a few miles, it might be said it fulfllled the description because such a tract would be bounded to the north by the Cuiver, to the south by the Dardenne, and in front by the Mississippi. But this would hardly be termed *the* tract situated between such rivers. Had Clamorgan asked for *a* tract so situated, and had employed only the other terms above quoted, there might be a doubt how far back such a tract extended. There could be no doubt the front was to be the Mississippi, the north boundary the Cuiver, and the south boundary the Dardenne, but as to the western limit

all would be doubt. But the applicant did not ask for *a* tract, but *the* tract, and it is to be noticed that the governor, in his ratification, adopts the same term, thus affording a suggestion that there was some degree of notoriety attached to the land so situated. If one, even at this day, should speak of "the country between the Tennessee and Kentucky rivers," all men would know what country was meant. But if he should say "a country between" such streams, no one would know whether he meant a country high up, or low down, on them. Besides, the word "the," in the petition, cannot be regarded as a chance expression, or as synonymous with "*a*," for the further reason that it is only "*the* tract between" the two rivers which could, together with the lateral tracts, afterwards described, "encompass in their extent all the waters of the" said streams. And that the three tracts should encompass all of these waters was a primary object with the applicant, "in order that," as he stated in conclusion, he might "erect saw and grist mills thereon, place there a number of cattle, have slaughter houses," &c. In the Sutherland case (19 How. 365) the courts assumed from the term "known by the name of El Cahon," or "the Chest," employed in the grant, that there was a rancho having such a name and that it had "some known boundaries."

If, then, the court be satisfied that so far the language of the petition embraces *all* the land between the two rivers, and not a *part* of it, if it be satisfied that before going on to describe the upper and lower side tracts the terms employed with relation to the natural boundaries, delineated, with reasonable certainty, the thing prayed for, then we contend that the subsequent reference to theoretical lines, and conjectural distances, must, under the rules, be so harmonized with the antecedent definition by natural monuments that the latter shall prevail.

The claimant proceeded, "The petitioner wishes, *moreover*, that you would be pleased to grant to him sixty arpens of land in front, on the banks of the Mississippi, immediately adjoining the mouth of the first above-named river La Charette, in descending the current of the Mississippi; and *again*, sixty arpens in front, also on the banks of the Mississippi, adjoining immediately to the upper side of the mouth of the second above-named river, Au Cuiver, and ascending the current of the Mississippi." The words

"moreover," and "again," underscored by us, taken with the context, show that Clamorgon thought of, and prayed for, these tracts as additions or incidents to the principal thing, already defined, to be separated from it by the natural limits, or rivers, which were its boundaries to the north and south. The language of Carondelet's ratification sustains the same view. He says, after referring to the grant, by Trudeau, of the principal or main tract, "*also* sixty arpens to the north, and sixty arpens to the south of said rivers, which serve to determine the situation of said land, having the Mississippi in front." He had just named the rivers La Charette and Cuiver, and the word "which" refers to them, meaning that *such* rivers would "determine the situation of" the side tracts, having their fronts on the Mississippi.

Now up to this point, in the petition, grant and ratification, it must be observed, no back line to the lateral grants had been expressed. But, in the vocabulary of Spanish land law, and usages of surveying, in vogue at the time, the limit, in the rear, was as well understood as if the titles had expressly said it should be the head springs of each stream. To show how Spain would have surveyed these side grants we submit the following:

On September 5th, 1833, the register and receiver of the land office at New Orleans, Louisiana, acting as land commissioners, under the act of July 4th, 1832, (4 Stat., 561,) submitted a report on land claims in their district, embracing three to which we desire to call attention. The report is found in 6th State Papers, 665–702. On p. 675, under the No. 19, (Class B), they reported: "Jean Louis Gaston Villars claims a tract of land situated on the Bayou Dupont, in the Parish of Jefferson, and District of Barrataria, and about thirteen leagues distant from the city of New Orleans, *containing five leagues front on the said Bayou by a depth of three arpens, (being about twelve hundred and thirty-nine superficial arpens), bounded on one side by the "Rigolets," and on the other by the Bayou St. Denis.*"

On p. 675 they report claim, No. 23, (Class B), thus: "Jean Baptiste Degruy claims a tract of land situate on the Bayou Barrataria, in the Parish of Jefferson, and district of Barrataria, at about six miles from the river Mississippi, *containing about five leagues front, on the left bank of said Bayou, and one league front on the right bank, by a depth of twenty arpens on each side; bounded on one side by lands of Antoine Foucher, and on the other by the Bayou "Aux Carpes.*"

On p. 678, they reported claim No. 47 (Class B) thus: "Francois Enoul Livandais claims a tract of land situate in the parish of Jefferson, and district of Barrataria, at about thirty-three miles distant from the city of New Orleans, *containing about three and a half leagues front, on the right bank of 'Little Lake,' ('Petit Lac,') by a depth not exceeding three arpens, bounded on one side by the Bayou Des Amoureaux, and on the other side by a small stream, or cut-off, ('raccourci,') leading to the sea.*"

The act of Congress of March 3d, 1835, (4 Stat., 779,) while it confirmed most of the claims so reported, suspended the three above described, and, by section 2, it was made the duty of the commissioners to re-examine, and again report them with the evidence in full.

This was accordingly done, and the supplemental report is to be found in 8 State Papers, 343 to 381, made on December 1, 1835. On page 355–6, they report on claim, No. 19, (B,) of Jean Louis Gaston Villars, giving the evidence *in extenso.*

On page 358 they report on claim, No. 23, (B,) of Jean Baptiste Degruy, giving the evidence at large. On page 363–4 they report on claim, No. 47, (B,) of Francois Enoul Livandais, with the evidence complete. As thus fortified, and reported, these claims were confirmed by act of Congress of July 4th, 1836, (6 Stat., 682.) In due course they were surveyed by the United States, as they would have been under Spain, of course, and are now incorporated in the usual approved maps of the townships in which they are respectively situated. These surveys are shown by the respective plans L^1, L^2, L^3, (record, 172,) which are certified as true copies from the approved township maps by the Surveyor-General of Louisiana.

Claim No. 19, (B,) of J. L. G. Villars, represented by Plan L^1.

Claim No. 23, (B,) of Jean B. Degruy, represented by Plan L^3.

Claim No. 47, (B,) of F. E. Livandais, represented by Plan L^2.

By the Revised Statutes, section 2447, these claims, as thus surveyed, are entitled to patents, and may have been patented. They have been taken at random from a number like them, in Lower Louisiana, to show how the side grants of Clamorgan would have been surveyed under Spain or would now be surveyed under the United States by any competent surveyor familiar with the survey of Spanish land claims.

An examination of these claims will show that they had wide fronts on their respective water boundaries, with very small depths in comparison. No. 19 had a front of five leagues, by a depth of only three arpens, or about fifteen miles, by about 192 yards. No. 23 had a front of about five leagues, or 15 miles on one side the bayou, and a front of one league, or about 3 miles, on the other bank. The depth on each bank was 20 arpens = 58.18 chains = 1,279.96 yards, or about three quarters of a mile.

No. 47 had about 3½ leagues front, or about 17 miles, by a depth of only three arpens, equal to 8.73 chains, or about 192 yards.

When, therefore, we claim that Clamorgan's lateral grants have a front on the Mississippi of 60 arpens, (equal to 174.60 chains, or 3,841.20 yards, or about two miles and one-fifth,) with a depth extending the whole length of the respective "rivers which were to determine the situation of said land, having the Mississippi in front," it will be seen we claim nothing unusual under the Spanish land system. The difference between the side grants of Clamorgan and the above described claims of Villars, Degruy, and Livaudais, is only apparent, not real. The terms "front," and "depth," are purely arbitrary in such cases, though generally the "front" is used with reference to that part of a claim, in any given instance, which bounds upon the most notorious of those objects which limit it on any side. And then the depth is of course the extent of the claim in a direction about perpendicular to such front. The above three claims illustrate this rule. Their fronts are their respective extents upon the most notorious objects in their vicinity, viz: "Bayou Dupont," "Bayou Barrataria," or the "Little Lake." These being fixed their respective depths are measured according to custom on lines running back from the fronts and usually at right angles with them. Had Clamorgan asked for his upper side grants thus: "Also a tract of land fronting on the Au Cuiver, with a depth of 60 arpens, which river shall bound it on the South;" and for his lower side grant thus, "Moreover a tract of land fronting on the little river, called La Charette, alias Dardenne, having 60 arpens in depth, which little river shall bound it on the north," such descriptions, though apparently more in harmony with those in the claims under discussion, would in land law, and surveying usage, have been only another mode of defining the same tracts. The Mississippi, as compared with the

small streams Au Cuiver, and the Dardenne, was notorious, and as he had spoken of the eastern limit of his main grant as *its* "front," what more natural than that he should also refer to the eastern limits of his side grants, upon the same great river, as *their* fronts? To show that the surveys of the similar claims of Villars, De Gruy, and Livaudais, are in harmony with law and custom, see report of the General Land Office for 1869, p. 47, upon the subject of surveys, by the United States, of Spanish and French grants in Louisiana, Florida, Alabama, Mississippi, Arkansas, and Missouri. The Commissioner says: "The surveys of all such titles are in strict accordance, in measurement, form, and extent, with the land system of the government from which the titles are derived, and are incorporated with the United States rectangular method presenting, as it were, mosaic irregularities in connection with our rectangular surveys."

In 1789, Livaudais petitioned Miro, then Governor of the province of Louisiana, for a grant of a tract containing three leagues front, on the Bayou Des Allemands, with a depth of *one arpen*. That would make a tract of about 15 *miles front*, on the Bayou, with a depth of only 2.91 *chains or* 64 *yards*. Yet it was granted him by a regular warrant, or order of survey. This claim was confirmed unqualifiedly by the Old Board of Commissioners, for the Eastern district of the Territory of Orleans, acting under authority of Sec. 4, of the act of March 3rd, 1807, (2 Stat. 440), and was subsequently reported to Congress, and is now found in 2 State Papers, 317, under the number 202. It will be seen the Commissioners confirmed the claim "according to the laws, usages, and customs of the Spanish Government."

We will call attention to but one more such title, though the list might be extended *ad infinitum*.

On June 12, 1797, (soon after the grant to Clamorgan), the Baron de Bastrop petitioned Carondelet for a grant of six toises in depth, on each bank of the Bayou Bartholemi, (now called Bartholemew), extending from its mouth to its source. This is a navigable stream rising in southeast Arkansas, running southward into Louisiana, and emptying into the Ouachita river, on its east side, a little above the town of Monroe. He wished the land for precisely the reasons Clamorgan asked for his grant, in order that he might build mills, and have a monopoly of the entire stream, with

its banks, water supply, &c. On the same day Carondelet granted the same. The titles appear at large in 1st Clark's Land Laws, appendix 953. This claim was in due course laid before the Register of the land office, for the district north of Red River, in Louisiana, acting as a commissioner on land claims, under section 2 of the act of 11th May, 1820, (3 Stat., 573), who, on January 1, 1821, reported it for confirmation, under the No. 51, in the first class, (3 State Papers, 602), saying: "The Baron de Bastrop claims six toises of land, on each side of the Bayou Bartholemy, from its source to its mouth, founded on the grant from the Baron de Carondelet, to the claimant, under date of 12th June. 1797, and printed in the Land Laws, page 28. of the appendix. In this claim, John Heberard deposes that he was in the employ of the Baron de Bastrop, in 1799, and that he knows that a mill, for manufacturing flour, was built on the Bayou Seard which was commenced in the year 1798, and was manufacturing flour in the year 1799. This testimony is believed entitled to credit. The length of the Bayou Barthelemy is not exactly known, but it is believed to be upwards of one hundred miles, (by the meanders much more.) It rises in the Arkansas Territory, and empties into the river Ouachita, a few miles from the town of Monroe." This report was acted upon by act of 28th February, 1828, (3 Stat., 727), but the second section, for reasons stated, excepted claim No. 51, of the first class, with other claims, from confirmation. The reasons ceasing, the claim was confirmed by section 4, of the act of March 3d, 1851, (9 Stat., 597), in the event the Supreme Court, before whom the large claim of De Bastrop, for 144 square leagues, was then pending, should decide the same invalid. This the court did, (U. S. vs. Philadelphia and New Orleans, 11 How., 610), and hence the confirmation of the mill grant, to the Baron became final.

Now, six toises are equal to thirty-six French feet, or about 37 English feet. Hence Spain granted to De Bastrop a strip of land about 37 feet deep on each bank of a navigable stream from its mouth to its source; and such strip, following the meanders of this very tortuous stream, cannot be less than 150 miles long! But what is more remarkable is that the grant has actually been surveyed by the United States, and is now represented upon the approved township maps with appropriate sectional designations, areas, &c. At least this is so throughout that part of the Bayou

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In 1789, Livaudais petitioned Miro, then Governor of the province of Louisiana, for a grant of a tract containing three leagues front, on the Bayou Des Allemands, with a depth of *one arpen*. That would make a tract of about 15 *miles front*, on the Bayou, with a depth of only 2.91 *chains or* 64 *yards*. Yet it was granted him by a regular warrant, or order of survey. This claim was confirmed unqualifiedly by the Old Board of Commissioners, for the Eastern district of the Territory of Orleans, acting under authority of Sec. 4, of the act of March 3rd, 1807, (2 Stat. 440), and was subsequently reported to Congress, and is now found in 2 State Papers, 317, under the number 202. It will be seen the Commissioners confirmed the claim "according to the laws, usages, and customs of the Spanish Government."

We will call attention to but one more such title, though the list might be extended *ad infinitum*.

On June 12, 1797, (soon after the grant to Clamorgan), the Baron de Bastrop petitioned Carondelet for a grant of six toises in depth, on each bank of the Bayou Bartholemi, (now called Bartholemew), extending from its mouth to its source. This is a navigable stream rising in southeast Arkansas, running southward into Louisiana, and emptying into the Ouachita river, on its east side, a little above the town of Monroe. He wished the land for precisely the reasons Clamorgan asked for his grant, in order that he might build mills, and have a monopoly of the entire stream, with

its banks, water supply, &c. On the same day Carondelet granted the same. The titles appear at large in 1st Clark's Land Laws, appendix 953. This claim was in due course laid before the Register of the land office, for the district north of Red River, in Louisiana, acting as a commissioner on land claims, under section 2 of the act of 11th May, 1820, (3 Stat., 573), who, on January 1, 1821, reported it for confirmation, under the No. 51, in the first class, (3 State Papers, 602), saying: "The Baron de Bastrop claims six toises of land, on each side of the Bayou Bartholemy, from its source to its mouth, founded on the grant from the Baron de Carondelet, to the claimant, under date of 12th June. 1797, and printed in the Land Laws, page 28. of the appendix. In this claim, John Heberard deposes that he was in the employ of the Baron de Bastrop, in 1799, and that he knows that a mill, for manufacturing flour, was built on the Bayou Seard which was commenced in the year 1798, and was manufacturing flour in the year 1799. This testimony is believed entitled to credit. The length of the Bayou Barthelemy is not exactly known, but it is believed to be upwards of one hundred miles, (by the meanders much more.) It rises in the Arkansas Territory, and empties into the river Ouachita, a few miles from the town of Monroe." This report was acted upon by act of 28th February, 1828, (3 Stat., 727), but the second section, for reasons stated, excepted claim No. 51, of the first class, with other claims, from confirmation. The reasons ceasing, the claim was confirmed by section 4, of the act of March 3d, 1851, (9 Stat., 597), in the event the Supreme Court, before whom the large claim of De Bastrop, for 144 square leagues, was then pending, should decide the same invalid. This the court did, (U. S. vs. Philadelphia and New Orleans, 11 How., 610), and hence the confirmation of the mill grant, to the Baron became final.

Now, six toises are equal to thirty-six French feet, or about 37 English feet. Hence Spain granted to De Bastrop a strip of land about 37 feet deep on each bank of a navigable stream from its mouth to its source; and such strip, following the meanders of this very tortuous stream, cannot be less than 150 miles long! But what is more remarkable is that the grant has actually been surveyed by the United States, and is now represented upon the approved township maps with appropriate sectional designations, areas, &c. At least this is so throughout that part of the Bayou

(about half its entire length) lying within the State of Louisiana, as may be seen on the maps of the General Land Office. Moreover the claim is entitled to a Federal patent, under the express provisions of sec. 4, of the act of March 3d, 1851, confirming it. (9 stat., 597.)

Counsel think that the foregoing five claims show, with reasonable certainty, how the side grants of Clamorgan would have been or should now be surveyed, to whatsoever extent they may go up the respective streams; but admit they do not conclusively show what such extent should be, whether the sources of the streams on which they are respectively situated, or some intermediate point. Their authority ought though to be controlling upon the first point, unless the government can adduce something to weaken it, because the General Land Office, as we have shown, says that such surveys are in harmony with the old French and Spanish systems.

This brings us back to the question, How far up the little rivers Au Cuivre and Dardenne Clamorgan and the authorities intended the side tracts to extend? Now, we think it has been shown the central tract was to extend on its upper or north side to the head of the Cuivre, and on its lower or south side in like manner to the head of the Dardenne. This certainly was to be *its* extent, unless the court departs from the long-established rule of construction, which we will refer to presently, and subordinates the calls for "fixed, natural, and ascertainable boundaries," to contradictory calls for "initial points, courses, and distances." Clamorgan, like De Bastrop, asked for the streams, mainly with a view to build mills and slaughter-houses on them, and in order to avoid having persons owning land above him on either stream, who might obstruct and divert his water or timber supply, or interfere with his cattle, or molest him in any way, he naturally sought to obtain absolute control of both the banks of both streams. This object could only be accomplished by controlling such streams from their sources in the hills to their points of junction with the Mississippi in the low lands. The evidence shows that seats for water mills (and none others were known in Clamorgan's day) were only to be found high up on the streams where they were narrow and readily controlled by dams. (Record, 98, 99, 100, and 101.) Lower down they are navigable for rafts and small boats in high water, and it is plain, from their size and extent, as shown on the State maps of Missouri, and the evidence of the witnesses in this case, (record, 99,) that down

towards their mouths they were entirely beyond the power of any one to control them for milling or logging purposes. By act of Dec. 17, 1822, the Missouri Legislature declared the Cuivre to be "a public highway for the passage of all boats," &c., from its mouth to Moscow or Rss' Mills. (Laws of La. and Mo., vol. 1, p. 1003.)

In "Stoddard's Sketches of Louisiana," p. 222, he states that the rivers in this, the St. Charles District, were well suited for sites for water mills, and, as such, had attracted attention at an early day. There was much testimony of experts and engineers in the district court upon the question of how the three tracts should be surveyed.

It is too lengthy to notice in detail. An examination of it, however, will show that all of the witnesses agree that the side tracts are to extend to the sources of the small streams with a width, on each, of sixty arpens, *unless* such extent is controlled by the allusion to course and distance. In other words, none would restrict them to a less extent, toward the interior, than the streams themselves have, provided the mode of location depended only upon the calls for the natural monuments. (Record, 74, 77, 78, 102, 112, 119, 120.)

It is the calls for courses and distances, subsequently added by the applicant, and repeated by Carondelet, which alone cause any of the witnesses to doubt. Their doubts in no case forbid that such tracts must have each a front of sixty arpens on the Mississippi, and the same width along their respective rivers, *so far as they extend up the same.* It is the *extent up* the valleys of the side rivers which they differ about. This was natural, for they were not judges of law, and knew not the rule, or erred in its application, which justified them in ignoring theoretical lines and directions in favor of immutable monuments, like rivers and valleys. They also all agreed, even the stubborn Messrs. Pitzman & Hesse, (record, 74, 77, 78, 101, 111, 112, 118, 119, 120,) that the central tract must extend to the sources of the rivers, unless it, too, was limited by the reference to courses and distances employed in the petition and confirmation. And why should the applicant desire to have less for his middle tract than *all* the land between the Cuiver and Dardenne? His object was to raise cattle, build water mills, for sawing lumber, and grinding grain, and to have slaughter-houses. Now we all know that the heavy wooded country, con-

tiguous to the Mississippi, offered no range for horned cattle, and of course they are what Clamorgan meant. It was only the open prairie region, out near the heads of the small rivers mentioned by him, which would afford a cattle range. (Record, 103.)

Now, if it is clear the middle tract must embrace all the land between the two rivers, extending on its north side, from the mouth to the source of the Cuiver, and on its south side from the mouth to the source of the Dardenne, then it must follow that the side grants have the same extension on each side toward the interior. Clamorgan and the authorities could have had no reasons for a contrary rule. That construction must be bad which gives him the south bank of the Cuiver, and the north bank of the Dardenne, throughout the length of those streams, and yet limits him on the opposite banks of the same streams, to a less extent. Strange if Spain intended him to control, for his special needs, the whole south bank of the Cuiver, from one end to the other, yet limited that control of the north bank to a space extending from the mouth perhaps only half way up the stream. Equally as strange, too, if she intended him to control the north bank of the Dardenne, from its mouth to its source, for his peculiar uses, and yet granted him similar control of the south bank from the mouth, perhaps only half way up that stream. The petitioner contemplated that his "said lines should encompass *all* the waters of said streams," and for the reasons stated, and not a portion of said waters. It would be absurd to suppose the three tracts were to have different depths, on the small rivers separating them. If the mode of fixing the rear line, referred to by the claimant, does nothing else it surely shows that he and Carondelet intended all the tracts should have the same depth. They must *all* extend far enough in the rear to "encompass all the waters" of the Cuiver and Dardenne, or else they must all be limited by the same rule, and be bounded on the west side by one and the same right line. There is no escaping this dilemma.

This brings us to a consideration of that part of the description which conflicts with the parts heretofore dwelt upon. It is this conflict that alone creates the slightest doubt what lands were intended to be granted. It is this conflict that alone has troubled the witnesses, as experts, in their views about the mode of surveying the different tracts. And here we call attention to the circum-

stance that the applicant divided his description into three very distinct parts. (Record, 127.)

1st. He plainly defined the tract situated between the small rivers, without reference to any rear line, coming to a full stop as if his work was complete.

2d. He then, in very apt language, defines the small side grants and comes to a full stop again.

3d. He then, referring to what he had already so well defined as "*the three different above-described tracts*," ventures, not upon a further mode of description or definition of the lands, it must be remembered, but upon a totally unnecessary task, with a view solely to fixing the rear lines of the three.

And he suggests such mode in this way: "The depth of the *three different* above-described tracts of land to be extended by two lines starting from the banks of the Mississippi, one from the most southern and the other from the most northern point (of the front) of the above demanded tracts, which two lines shall be run parallel on each side, in a westerly direction, until they reach the top of the high hills in the rear, and from there the said two lines to be continued and prolonged in the same westerly direction until they reach a point at the distance of about two hundred arpens from the foot of said hills, and then those two extreme points shall be connected by a straight line, which shall be so run as to form the *fourth* side of the said *three* tracts here above demanded. *The said lines encompassing in their extent all the waters of the above-mentioned rivers, Lacharette, alias Dardenne, and Au Cuivre,* in order that, hereafter, the petitioner may erect saw and grist mills *thereon,* also place there a number of cattle, have slaughter-houses, and send salt meat to the capital."

This description of the mode of defining on the ground the back line, with the antecedent description of the three tracts, was adopted by Trudeau in his concession and order of survey. He says, (record, 128:) "The surveyor of this jurisdiction, (as soon as the occupations of his place will permit,) shall survey in favor of the party interested *the extent of land he solicits in the way and manner described in the foregoing document,*" &c.

Carondelet does the same, but less directly. He says, (record, 129,) in his letter to Trudeau: "I have read your official note, dated 11th of last March, in which you state the motives which have induced you to grant to Mr. Clamorgan *the* tract of land

situated between the two rivers Charette and Cuivre, both emptying into the Mississippi; *also* sixty arpens to the north and sixty arpens to the south of said rivers, which serve to determine the situation of said land, having the Mississippi in front." Carondelet then adds: "Two parallel lines are to be drawn, running in the interior of the country, until they reach at the distance of two hundred arpens beyond the foot of the first hills, conformably to the solicitation of the party interested." The governor seems to have treated the reference to ideal lines and supposed distances in the petition as merely an incident, and not a principal; as following, not controlling, the prior description. He repeats substantially the material parts of the description, and, with strange aptness, tells what he understands by them, viz., "*the* tract of land situated between the two rivers Charette and Cuivre, both emptying into the Mississippi;" "*also* sixty arpens to the north and sixty arpens to the south of said rivers, which serve to determine the situation of said land, having the Mississippi in front." But when it comes to the parallel lines and their lengths and directions, he seems to understand that the applicant had merely superadded them out of abundant caution, and for an unimportant purpose. For, in referring to them, he does not even complete the reference, and omits any allusion whatever to the imaginary back line, as stated by Clamorgan. He says the two parallel lines are to be drawn towards the interior, but neither gives their starting points nor their directions, concluding his brief allusion to them thus, * * * "conformably to the solicitation of the party interested." From all which it is reasonable to infer he treated the language about the ideal rear line as unimportant, if not surplusage.

What we shall now try to show is that such language is in direct conflict with the plainer parts of the description, and that, under the rules, it must be disregarded, and the plainer parts allowed to control. We state it as one of those rules, and indeed the leading one in the construction of open or descriptive grants, and deeds for lands, that a repugnancy between calls for well known, and immutable natural objects, such as rivers, mountains, valleys, and the like, and calls for conjectural distances, and directions, must be in general solved by rejecting the latter, and locating the lands by the former.

In Cotton vs. Seavy, (22 Cal. 496,) the Supreme Court of Cali-

fornia said: "It is clearly established that when a deed of land describes the subject matter by monuments clearly identified, such as a river, a spring, a mountain, a marked tree, or other natural object, and courses and distances and quantity are likewise inserted, which disagree with the monuments; the description by monuments shall in general prevail; for it is more likely that a person purchasing or selling land would make mistakes in repect to course, and distance, and quantity, than in respect to visible objects, which latter, from being mentioned in the deed are presumed to have been examined in time."

In Jackson vs. Sprague, (1 Paines Ct. Ct. Reports, 494,) the court said: "Where the quantity of a tract of land is given, as well as the metes and bounds, the latter will control the location. Where the different parts of a description of the metes and bounds are repugnant and contradictory to each other, such parts are to be rejected, and such retained, as will leave enough plainly and clearly to designate the land intended to be conveyed."

In Perman vs. Wead, (6 Mass. Reports, 131,) it is said: "When the boundaries of land are fixed, known, and unquestionable monuments, although neither courses, nor distances, nor the computed contents correspond, the monuments must govern."

"If a call be made for a natural or artificial object, it shall always control mere course and distance," (Holmes *et al.*, vs. Trout, 7 Pet., 171.)

"If a location have certain natural calls, sufficient to support it, and to describe the land, other calls less material and incompatible with the essential calls of the entry may be discarded," (Massie vs. Watts, 6 Cranch, 165.)

"Recourse is to be had, 1st, to natural objects; 2nd, to artificial marks; 3rd, to course and distance," (Bolton vs. Laun, 16 Texas, 110–113).

"It is a general principle that the course and distance must yield to natural objects called for in the patent." (McIvers vs. Walker, *et als*, 4 Wheat, 445).

"A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance." (Chief Justice Marshall in Newsom vs. Pryor's lessee, 7 Wheat., 7).

"Where more than one description is given, and there is a discrepancy, that description will be adhered to as to which there is

the least likelihood that a mistake could be committed, and that rejected in regard to which mistakes are more apt to be made." (3 Washburn on Real Prop., 3d Ed., 348–53).

"There is no principle of land law more firmly settled in this, and probably most of the states, in respect to country lands than this: That where the calls of a deed, or other instrument, are for natural or well known artificial objects, both courses and distances, when inconsistent with such calls, must give way and be disregarded." (McPherson vs. Foster, 4 Wash. Ct. Ct. Reports, 45).

Such authorities might be multiplied to any extent. There can be no doubt at all about the rule; the only open question is its applicability to the case at bar. Hence we are to inquire if there be such an irreconcilable conflict between the calls for natural objects, and those for courses and distances. For if there be the rule must apply, and the natural monuments must prevail.

We have already referred to, and explained the maps in this case. It is agreed that they truly represent the rivers referred to in the instruments sued on, (Record, 169), showing their mouths, their sources, and what should be considered the main stem of the Cuiver. The stipulation submits all the plans, with their respective quantities calculated and reported by the expert, (Record, 66), and thus having agreed the parties have limited the inquiry here, as to location, to narrower ground than it might have embraced in the absence of such an agreement.

Our own theory of location is shown on "New Plan F," and is in harmony with what has gone before in this argument. The letters A, and I, represent, respectively, the points at which the Au Cuiver and Dardenne enter the Mississippi. The letter B is the point sixty lineal arpens above the mouth of the Cuiver, being the upper terminus of the aggregate fronts of the three tracts; and the letter H, likewise, marks the lower terminus of the aggregated fronts, being sixty lineal arpens below the mouth of the Dardenne. D is the head spring of the upper lateral boundary, the Cuiver, and E is the head spring of the lower lateral boundary, La Charette, alias Dardenne. The line CD is intended to be sixty lineal arpens in length, and to be drawn from the head spring of the Cuiver, on a course at right angles to the general course of the stream, at that point. In like manner the line EF is to be sixty lineal arpens long, to start from the head spring of the

Dardenne, and to have a direction at right angles to the general course of the stream at that point. The waving line drawn from B to C is intended to be sixty lineal arpens from and north of the Cuiver from its mouth to its source. And the waving line from G to F is likewise intended to be drawn sixty arpens from and south of the Dardenne from its mouth to its source. These lines, then, beginning at B, on the Mississippi, thence to C, thence to D, thence to E, thence to F, thence to G, and thence sixty arpens to H, also on the Mississippi, inclose the three tracts of land described by Clamorgan, and granted him by Spain. From this plan, and those of the government, it is apparent an irreconcilable contradiction exists in the calls. No location will satisfy them all. The calls for the Mississippi, as the front of the three tracts, can be followed; those for the Cuiver as the upper, and the Dardenne as the lower limits of the middle tract, can be followed; the calls for the Cuiver as the southern boundary of the upper lateral tract, and for the Dardenne as the northern boundary of the lower lateral tract, can be followed;—they are all "natural and ascertainable," and now ascertained monuments. They can all be followed, are well known, and unchangeable. And, so followed, they give us an entire aggregated body of land "encompassing all the waters of the above mentioned rivers, La Charette, alias Dardenne, and Au Cuiver," affording the owner the right, which he sought, to "erect saw and grist mills," on all of said waters, and giving him a territory in some sort in keeping, in its extent and privileges, with the services and losses it was intended to reward. But the calls for the parallel lines, with their supposed courses and distances, cannot be followed. It is impossible, and the lines on the government plans, and the testimony of the experts, show it is impossible, and why. But, fortunately for us, this cannot defeat a severance from the domain, and thus make our title void for uncertainty. The rules we have invoked forbid. They tell us to reject, to discard these parallel lines, if an adherence to them would breed a conflict with the more important natural boundaries.

The executive and judicial action in the Virginia Military Reservation, in Ohio, cited heretofore, teach us to give the middle tract all the land between the two small rivers; and the line D E, on "New Plan F," is just such a line, drawn from the head of one to the head of the other, as it was sought to run from the head of the Little Miami to the head of the Scioto, as the western bound-

ary of that reservation. But it is plain no such back line will agree with the mode of fixing the depth of this middle tract if we adhere to the parallel lines.

The testimony of the experts, too, (heretofore cited,) with an examination of the titles as an entirety, and the analogies of French and Spanish surveys, teach us to give, for the upper and lower side grants, strips sixty arpens in width, extending to the headwaters of the Cuiver and Dardenne. But it is also plain they cannot have such extension to the rear if we try to locate their rear by the parallel lines. Nay, what is worse, and more conclusive, against regarding those parallel lines at all, is the plain fact from the shape of the entire front, and the course of the streams from the interior, that they cannot be drawn on any course, toward the rear, without impairing one or more of the tracts as described by the natural bounds.

Take Plan J, for instance, and examine the testimony of Cozzens, Pitzman, and Hesse, as to the principles on which it was constructed. The parallel lines start from the points B and H, the upper and lower termini of the front, and run west. But the havoc they create with the central grant, and the lower lateral grant, at once condemns them. It is too plain Clamorgan intended his central tract to at least extend to the Dardenne, whatever might be its back line; also that he asked *some* land south of the Dardenne, whatever might be its extension toward the interior. But the side lines thus run destroy half of his main tract, and entirely destroy the tract south of the Dardenne. The line from H would run several miles up the middle of the Mississippi, (record, 92, 95, 99, 115,) and would enter the middle grant, about the middle of the front, and from there run nearly through its center! Then, too, the upper side line, drawn west from B, would not give such an upper tract as was prayed for or granted. It would be sixty arpens wide, on the Mississippi, but would increase rapidly in width toward the interior, and soon attain a width of several miles! (Record, 92.(And this tract, embraced in the parallel lines so run, with its depth fixed according to the logic adduced in their support, would only contain 38,672 acres, (Record, 35,) which shows the absurdity of the theory if nothing else did.

But suppose the parallel lines be run southwest. Plan I is constructed to show them as thus drawn, (Record, 85.) It breeds equal absurdities. By them Clamorgan would be cut off entirely

from the Cuiver, and a great part of the central tract would be sacrificed. He would get nothing of his upper side tract, save a small triangular piece of swamp land, having, indeed, sixty arpens front on the Mississippi, immediately above the mouth of the Cuiver, but nothing more. It would not extend up that stream at all, and no one versed in such matters could call it a tract of sixty arpens north of such stream. It would not embrace a single possible location for a water mill, or give any of the advantages on that stream Clamorgan contemplated. The tract embraced in the parallel lines, so run, with the back line as therein laid down, would only contain 94,136 acres, (Record, 35,) which, of course, shows that Spain could not have intended to grant, nor the grantee to accept, such a tract in compensation for his losses and services. At no time, and under no circumstances, were the lands ever computed at less than 448,000 arpens, (see "statement.")

The plan I seems to have been inspired by the unjust diagram attached to the report of the Board of Commissioners, dated September 30, 1835, referred to in the statement, and to be found in the 8th State Papers, 22. On page 22 the Commissioners refer to this as "the accompanying plat marked A," containing about 80,000 acres. As no survey had ever been made the plat, so far as it tended to show the lines of the grant, should, in common honesty, have been referred to by the board as an ideal representation of *their* view of the mode of location. They first got the Chief Clerk of the Surveyor General of Missouri to construct a mere skeleton map on a very reduced scale, showing the lines of the then existing surveys in certain townships, which the claim would touch *if located according to their views.* And that theory we can but *infer* is bodied forth in the parallel lines drawn southwest from the upper and lower termini of the front, and a back line established no one knows how. We say *infer* because there is nothing, on the face of the plat, to show what tract represents the Clamorgan grant. There is nothing in the plat, or in their allusion to it, to show upon what principle they establish the back line, and no distances are given, on either the side or back lines, by which we can tell if the tract, embraced by them, would contain eighty thousand, or eighty million acres. But the whole thing is calculated to deceive, and must have been so intended. No public surveys, much less township maps, are constructed on so small a scale, or ever were. The scale is, and was, 40 chains

to the inch—not 200 chains to the inch. Then, too, the maps of United States surveys are constructed for useful and practical purposes, and show the courses and distances on the lines, the areas of the tracts, names of claimants, of the private claims, &c., &c. This plat shows nothing but some mere skeleton lines, and was evidently gotten up as a ground work, on which the Commissioners themselves very probably superimposed the parallel lines, and back line, according to their own ideas of the meaning of the grant. The Surveyor General don't even sign or certify it, probably knowing it was wrong, but the chief clerk does so, a thing the law gave him no right to do. But even he timidly uses the words "conformable to the township plats on file," instead of boldly saying it was a copy. Anyone who will take the trouble to go with this fraud to the division of the General Land Office, having charge of the Missouri township maps involved, will see the truth of all we here state.

But to return to plan I of the government. The testimony at large shows its infirmities. (Testimony of Pitzman, record, 84–93, 115 to 124; Cozzens, record, 93 to 105; Hesse, record, 105 to 114.) They all say it will leave no land north of the Cuivre at all save a small irregular piece at the mouth of that stream, and that the land south of the Dardenne, between it and the lower parallel line will vary greatly in width, being, in places, much less than 60 arpens, and, in others, three or four miles. We will state here that this plan was made the basis of the decree below; the expert having reported that it contained 94,136 acres. (Record, 35, 36.) The decree was *pro forma*, and the plan selected haphazard, by the judge, who declined to examine the question of location, but simply looked to the validity of the title. But to resume. Let us suppose the parallel lines should run northwest. This would lead to worse results than ever. For the upper terminus of the front being near about northwest from the lower terminus, it would follow that lines drawn from such points northwest would nearly coincide, and to whatever distance they might be extended into the interior they would embrace but little if any land between them. This is perhaps the reason the government did not venture upon a plan illustrative of this theory among the others.

The plans J and I are the only ones before the court representing a location in pursuance of these parallel lines and their calls. We hope we have shown that they so conflict with the plainer calls that they come within the application of the rules heretofore cited,

and must hence be ignored. But the government, as if to hit upon some plan the court here might adopt, and by which our quantity might be sported away, got up certain other plans H and K. The first cannot be made a basis of a decree here under the stipulations, (record, 169,) because it is incomplete in itself, showing no back line or area, and because the expert (record, 35) could not and did not estimate any quantity for it or take it into consideration. The second plan, K, was intended, we suspect, as a *reductio ad absurdum* on the part of the government. It was designed to show what Clamorgan would take if his lines should "encompass all the waters" of the Cuivre and Dardenne rivers. But as the grant must be construed as a whole, and the allusion to "encompassing all the waters" of these streams was only a part, and mere addenda at that; and as, too, the stipulations (record, 169) eliminate the north fork of the Cuivre from the case, and we do not contend for any such absurd quantity, it was wrong to complicate the case and swell the record with the plan at all.

We must, therefore, return to plan J as furnishing the only other theory of location, advanced by the government, than those by parallel lines. This plan, in the original, showed in yellow and red lines two distinct theories. The one by parallel lines, shaded yellow, drawn west from B and H, we have considered. The other, by red lines, we will now examine. It adopts the only sensible view of the intent of the grant, but don't carry it far enough. It discards the parallel lines, and gives us the entire central tract, and each side tract, with its front on the Mississippi of sixty arpens, and a corresponding width on the small rivers, but limits the rear of each by an arbitrary straight line, intended to be drawn parallel to the general course of the Mississippi. The expert found this theory to embrace 94,420 acres, (Record 35), which, for this reason, if for no other, cannot be the quantity intended to be asked for, granted to, or accepted by Clamorgan. The testimony shows such a tract would not extend out to the prairie region where alone the grantee could have found grazing for his cattle—that it would not extend high enough up the Cuiver and Dardenne to give him the best selections for mill-seats, and might not afford him any on the lower portions of those streams. And we know, from the authority of the plans before the court, that such a location would have exposed the grantee to the very dangers he wished to avoid, viz: having troublesome neighbors

to the inch—not 200 chains to the inch. Then, too, the maps of United States surveys are constructed for useful and practical purposes, and show the courses and distances on the lines, the areas of the tracts, names of claimants, of the private claims, &c., &c. This plat shows nothing but some mere skeleton lines, and was evidently gotten up as a ground work, on which the Commissioners themselves very probably superimposed the parallel lines, and back line, according to their own ideas of the meaning of the grant. The Surveyor General don't even sign or certify it, probably knowing it was wrong, but the chief clerk does so, a thing the law gave him no right to do. But even he timidly uses the words "conformable to the township plats on file," instead of boldly saying it was a copy. Anyone who will take the trouble to go with this fraud to the division of the General Land Office, having charge of the Missouri township maps involved, will see the truth of all we here state.

But to return to plan I of the government. The testimony at large shows its infirmities. (Testimony of Pitzman, record, 84–93, 115 to 124; Cozzens, record, 93 to 105; Hesse, record, 105 to 114.) They all say it will leave no land north of the Cuivre at all save a small irregular piece at the mouth of that stream, and that the land south of the Dardenne, between it and the lower parallel line will vary greatly in width, being, in places, much less than 60 arpens, and, in others, three or four miles. We will state here that this plan was made the basis of the decree below; the expert having reported that it contained 94,136 acres. (Record, 35, 36.) The decree was *pro forma*, and the plan selected haphazard, by the judge, who declined to examine the question of location, but simply looked to the validity of the title. But to resume. Let us suppose the parallel lines should run northwest. This would lead to worse results than ever. For the upper terminus of the front being near about northwest from the lower terminus, it would follow that lines drawn from such points northwest would nearly coincide, and to whatever distance they might be extended into the interior they would embrace but little if any land between them. This is perhaps the reason the government did not venture upon a plan illustrative of this theory among the others.

The plans J and I are the only ones before the court representing a location in pursuance of these parallel lines and their calls. We hope we have shown that they so conflict with the plainer calls that they come within the application of the rules heretofore cited,

and must hence be ignored. But the government, as if to hit upon some plan the court here might adopt, and by which our quantity might be sported away, got up certain other plans H and K. The first cannot be made a basis of a decree here under the stipulations, (record, 169,) because it is incomplete in itself, showing no back line or area, and because the expert (record, 35) could not and did not estimate any quantity for it or take it into consideration. The second plan, K, was intended, we suspect, as a *reductio ad absurdum* on the part of the government. It was designed to show what Clamorgan would take if his lines should "encompass all the waters" of the Cuivre and Dardenne rivers. But as the grant must be construed as a whole, and the allusion to "encompassing all the waters" of these streams was only a part, and mere addenda at that; and as, too, the stipulations (record, 169) eliminate the north fork of the Cuivre from the case, and we do not contend for any such absurd quantity, it was wrong to complicate the case and swell the record with the plan at all.

We must, therefore, return to plan J as furnishing the only other theory of location, advanced by the government, than those by parallel lines. This plan, in the original, showed in yellow and red lines two distinct theories. The one by parallel lines, shaded yellow, drawn west from B and H, we have considered. The other, by red lines, we will now examine. It adopts the only sensible view of the intent of the grant, but don't carry it far enough. It discards the parallel lines, and gives us the entire central tract, and each side tract, with its front on the Mississippi of sixty arpens, and a corresponding width on the small rivers, but limits the rear of each by an arbitrary straight line, intended to be drawn parallel to the general course of the Mississippi. The expert found this theory to embrace 94,420 acres, (Record 35), which, for this reason, if for no other, cannot be the quantity intended to be asked for, granted to, or accepted by Clamorgan. The testimony shows such a tract would not extend out to the prairie region where alone the grantee could have found grazing for his cattle—that it would not extend high enough up the Cuiver and Dardenne to give him the best selections for mill-seats, and might not afford him any on the lower portions of those streams. And we know, from the authority of the plans before the court, that such a location would have exposed the grantee to the very dangers he wished to avoid, viz: having troublesome neighbors

above him, on the same streams, obstructing or changing the water, interrupting the floating of timber, and, in other ways, affecting the monopoly he thought to obtain.

Thus, we think, we have shown that an adherence to the theoretical lines and distances, superadded by Clamorgan, for the purpose, only, of enabling the Surveyor to fix his rear lines, must involve us in an irreconcileable conflict with the plainer calls for the "fixed natural and ascertainable boundaries." If we have done so, then the rules relieve us, and if, after discarding such calls, enough remains to locate the grant, it cannot be pronounced void for uncertainty.

And here the question may be asked, does there remain enough, eliminating the allusion to the parallel lines, on which to locate it? This we have already argued. But, before leaving the point, we wish to say in all confidence that there is not in the whole history of descriptive open grants, whether coming before commissioners, or Congress, or the courts, from any of the states or territories, carved out of our acquisitions, under the treaties of 1803, 1819, and 1848, a single title in which the description is so singularly clear, and unmistakable, as that employed by Clamorgan in his petition, and partly repeated by Carondelet in his confirmation. Bereft of the calls for courses and distances, the remaining calls are absolutely unerring. No land lawyer, no surveyor, can find but one meaning for them. They gave the old poineer "*the tract of land situated between the two rivers, Charatte and Cuiver, both emptying into the Mississippi; also, sixty arpens to the north, and sixty arpens to the south of said rivers, which serve to determine the situation of said land, having the Mississippi in front.*" This was what Carondelet understood by the petition, and these were his very words in ratifying the grant. Who can doubt what land was intended?

But a new difficulty faces the government. Suppose it be conceded that the depth should be fixed by adopting the parallel lines. Suppose the side rivers ran due east, and hence parallel to each other, (as it was probable the applicant and the authorities thought they did,) so that lines run west from the upper and lower ends of the front would not impair either the central or the lateral tracts. What then? It would necessarily follow that this court, on this record, could not even then locate the lands by the aid of such lines. And the reason is that the grant itself affords no *certain*

means of telling how far these lines must go in the interior before they stop, and the government has not supplied the want by competent proof, or any proof. They did not attempt it, in the court below, for the excellent reason that the further they went in that direction the greater the embarrassments. Clamorgan said, after describing the tracts solicited, "the depth of the three different above described tracts of land to be extended by two lines, starting from the banks of the Mississippi, one from the most southern, and the other from the most northern point (of the front) of the above demanded tracts, which two lines shall be run parallel, on each side, in a westerly direction, until they reach the top of the high hills in the rear, and from there the said two lines to be continued and prolonged, in the same westerly direction, until they reach a point at the distance of about two hundred arpens from the foot of said hills; and then those two extreme points shall be connected together by a straight line which shall be run so as to form the fourth side of the said three tracts here above demanded. The said lines encompassing in their extent all the waters of the above mentioned rivers, La Charette, *alias* Dardenne, and Au Cuiver, in order that hereafter the petitioner may erect saw and grist mills thereon, also place there a number of cattle, have slaughter-houses, and send salt meat to the capital." These, and the other descriptive terms of the petition, are adopted by Trudeau, generally. But the Governor General, in his approval, shows in what sense he took them. He says, "the tract of land situated between the two rivers, Charette and Cuiver, both emptying into the Mississippi; also 60 arpens to the north, and 60 arpens to the south of said rivers, which serve to determine the situation of said land, having the Mississippi in front. *Two parallel lines are to be drawn, running in the interior of the country, until they reach, at the distance of two hundred arpens beyond the foot of the first hills, conformably to the solicitation of the party interested.*" Now there are good reasons to show the above language of Clamorgan was not intended to do more than furnish a rule for fixing the rear lines of his three grants when the surveyor should have time and opportunity to survey them.

1st. He had already plainly stated the side and front lines of all three. He had given the great Mississippi as the front, he had said the middle tract would be bounded south by the Dardenne, and north by the Cuiver, "*the one on the south, the other on the*

north, will serve as boundaries to those two sides." He had said the upper lateral grant should be bounded south by the Cuiver, and the lower lateral grant north by the Dardenne. This was sufficient. It could not be improved upon, and he knew it, for,

2d. In his allusion to the mode of fixing the depth, he refers three different and distinct times, to his previous description, as complete, "the three different above described tracts of land," "the above demanded tracts," "the said three tracts here above demanded."

3d. The Governor, in repeating the descriptive language of the petition, (which must have been before him, so well does he follow it in substance,) treats as surplussage the allusion to the parallel lines, referring to them, and then leaving the sentence unfinished, though he had before given prominence to the important part by substantially adopting it.

4th. The applicant was not willing to go to the expense of a survey of so great a tract before the grant was assured to him by the Governor. But it could not be so assured unless the land were sufficiently described. This, of course, he knew, and hence he made a description amply sufficient, under the custom then prevailing, for the use of the granting authorities. His allusion to *starting the lines in a westerly direction*, from points sixty arpens above and below the streams, *running* them parallel into the interior, *measuring* two hundred arpens from some other point, and, finally, to "a *straight* line which shall be *run* so as to form the fourth side," &c., all this goes plainly to show he was thinking only of the field operations of the surveyor who should ultimately be sent to survey the grant. It shows he did not intend it as descriptive of the thing to be granted, upon which description the authorities were to act. And it is clear Carondelet took this view of it as his language implies.

But to return to the inherent difficulty of finding any back line at all by these calls. Suppose the surveyor had measured west from the upper end of the front, (the side streams running due east, and parallel as we have supposed;) Clamorgan says he will proceed until he reaches "the top of the high hills in the rear," "and from there he will proceed in the *same* westerly direction." How far will he proceed until he shall "reach a point at the distance of *about* two hundred arpens from the *foot* of said hills." As this directory language was used for both side lines the sur-

veyor would, of course, run the other line in the same way. Carondelet's language differs slightly from Clamorgan's, but his phrase "conformably to the solicitation of" the applicant compels us to adhere to Clamorgan's when they seem to differ. Now Clamorgan speaks of "the high hills in the rear." Carondelet says "the first hills," but each agrees that the distance of about 200 arpens must be measured from the *foot* of these hills. But what foot? The eastern base, or the western? From the language of the petition it would seem to be the *western* foot, for the measurers were to begin on the banks of the Mississippi, and measure westwardly "*until* they reach the *top* of the high hills," and it was from "there" the lines were to go on in the same direction. So it is not reasonable that the measurers were to retrace their steps, return to the eastern foot, and begin their measurement from *there*. It was rather more reasonable that, once having attained the top, they should go on with their lines, and begin their measurement of the 200 arpens from a point yet to be attained, viz: the *western* foot.

We do not insist on such quibbles. We only mention them to show that these calls, not only contradict the plainer calls, but they are not clear in themselves, and leave us in great doubt how to follow them on the ground, even were we so inclined.

Again, the distance from the foot of the hills is not an absolute distance of 200 arpens. When he spoke of material calls, such as the fronts of the side grants, the applicant did not say *about* sixty arpens: he calls for the fixed and certain distance of just 60 arpens. But when it comes to the less important matter of fixing the depth, he then says about 200 arpens, and the subsequent reference to such depth as "encompassing all the waters of the" two rivers would seem to have been added, by way of explanation, that he looked more to the fact of "encompassing all the waters," than he did to the probable distance required to do it. Two hundred lineal arpens means 581.80 *chains*, or 12,799.60 yards, or about 7¼ miles, and the expression "about" seven miles and a quarter, is very indefinite in such a case, (Record, 127.) It was much more indefinite in Clamorgan's time, when leagues and miles were of little moment in estimating grants of land, (Sutherland vs. U. S., 19 How., 364.)

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But we will grant another supposition; and that is, the *eastern* "foot" of the hills was the point whence to begin the measurement

of the "two hundred arpens." The government remains embarrassed yet, because, supposing Clamorgan and Carondelet both meant the same hills, and they were the "first hills," yet there is absolutely nothing before the court to show where such hills begin, how far back they are situated from the river, nor whether they are the same distance back from the upper end of the front that they are from the lower end. And until these things are known no location of the back line can be predicated upon the parallel lines. It cannot be done, because no one can tell anything definite about the points on these lines where the measurements are to begin. But suppose, again, we could tell; suppose we knew the very points at the foot of the hills whence to run the lines west on each side, how far would we go? Not necessarily two hundred arpens. Clamorgan said *about* that distance. The mere distance, then, was an incident. What was the principal? There can be but one answer; the "encompassing the head waters of the Cuivre and Dardenne." If two hundred arpens would not do that then we must run 300, and if that were not sufficient then we must take a distance that would do it, for the incident follows, not leads, its principal.

"Encompassing" means "encircling, surrounding, confining." (Webster's Dictionary.) The head waters of those streams were "natural and ascertainable boundaries," and by the rules we are justified in going any distance in excess of 200 arpens, if necessary, to reach such monuments. The witnesses all agree to this rule, (record, 117, 118,) and the decisions heretofore cited sustain it. Hence if we knew which side of the hills we were to begin to run the 200 arpens from, we would still be bound by the calls for the heads of the streams, and would not necessarily stop at the precise distance of 200 arpens.

As before said, the court has nothing before it to sustain the limitation of the grant in the rear by the back lines laid down on either of the government plans I and J. Their plans H and K show no back lines at all, and are for this reason out of this question, if not for the reasons previously adduced. Now, recurring to the plans I and J, we see they show certain back lines, and the argument is that, if you think our title worthy confirmation, one of such back lines should limit us in the rear. But we have seen that such back lines depend entirely for the distances they shall be drawn from the Mississippi upon the correct location

of the line of hills. Therefore until the situation of those hills and their distances from the Mississippi at the termini of the front are known, or are agreed upon by the parties, no location, by rear lines predicated thereon, can be made.

Now the stipulations, (Record 169), find all the natural boundaries but these hills. As to them there was such doubt no agreement could be made. In the absence, therefore, of an agreement as to their position, has the government shown such facts by other proof? We hold that only in the most general and inaccurate way has this been done (Record, 89, 90, 95, 97, 101, 108, 124). No other proof, oral or documentary, is before the court than these opinions of these very willing government witnesses. They give only general opinions, and agree that the hills may be about two miles, more or less, (Record, 90, 108, 117, 124), out of the way, as thus guessed at. Surely the court, in the face of all the other difficulties about finding a back line, or lines, by adhering to parallel lines, will not attempt to face this new one. Plan I, on its upper "parallel line," gives "about 1050 chains from river," as the length of said line, and "about 1320 chains" as the length of the lower parallel line. It gives other distances by mere guess-work. And, as if to make the matter funnier still, upon the face of it two different quantities are expressed, viz: "about 86,762 acres," and again "contains about 94,136 acres!" Upon what measurements are these distances laid down? No survey was made, and the stipulations find nothing to justify this. Take again plan J, with its yellow parallel lines drawn west. We find the same thing. The upper line gives "860 chains," the lower one "950 chains," and the quantities are "about 38,672 acres," and again "about 38,000 acres!" These plans were concocted to confuse and mislead. We know no other purpose for which these assumed distances, and quantities, should have been placed upon them. We hope the court will scrutinize them closely. We think they did mislead the District Judge. Plan J shows by the red, or waving side lines, another mode of location. And it is correct so far as it goes. But the lands represented by it do not extend up the side streams far enough. The back line has no certain, or even approximate distance from the Mississippi. It shows upon its face the quantity of "about 80,000 acres." But the expert estimated the true quantity at 94,420 acres! (Record, 35). *Now in these government plans, I and J,* (the latter showing

two modes of location), *so far as they show any distances, any back lines, and any quantities whatsoever, they are all predicated upon the situation and course of the line of hills with reference to the Mississippi.* And as we have seen there is nothing satisfactory in the record to show where these hills are, or how they run with reference to the river, it follows that these plans and the theories of location they intend to represent, should be totally ignored.

In our "new plan F" we attempted to show no courses or distances of any lines whatsoever. We stated no quantities, and nothing else to mystify and mislead. It was only drawn to show the meaning of the grant, the government agreeing that it truly represented the natural boundaries, and leaving it to the sworn expert, alone, to say what quantity it represented. He found that quantity, (Record 35), to be 675,000 acres, and thus the issue, and it alone, raised by the plan was honestly before the court.

Rules of Construction.

This suit is in equity under Sec. 11, of the act of 1860, and is here to be "adjudged *de novo* * * as in other cases of appeals * * in chancery, and as equity, and justice, and the principles" of the act may require. "The principles" here referred to were held in the Lynd case, (11 Wallace, 647), to be the recognition of the validity of *de facto* titles, otherwise regular. Hence those principles do not arise in our case, and we recur to "equity and justice" as the other rules of decision laid down by the legislature. As to these the court said, in the Lynd case, (p. 647), "what range of discretion was intended to be conferred upon the special commissioners, and the courts, by authorizing them to decide according to the principles of equity, and justice, is perhaps not entirely clear. The probable meaning is that these principles are to be applied to each particular case. If it should appear that a grant was obtained by fraud, or was affected by any other special vice, it would be the duty of the tribunals to reject it. Or, if it should appear that a claim was honest and meritorious, but defective in point of form or completeness, it might be the duty of the tribunals to sustain it as an equitable, if not a strictly legal title."

The act of 1824 said, (section 1,) the courts should decide "in conformity with the principles of justice, and according to the laws and ordinances of the government under which the claim originated;" and, in section 2, "according to the law of nations,

the stipulations of any treaty, and proceedings under the same, the several acts of Congress in relation thereto, and the laws and ordinances of the government from which it," the claim, "is alleged to have been derived." Whether the rule of decision under the act of 1860 is less liberal and expansive than it was under the Missouri act, which shaped the jurisdiction under which all claims in Missouri, Arkansas, Alabama, Mississippi, Louisiana, and Florida, had been previously tried, it may not be material to inquire. In U. S. vs. Arredondo, (6 Peters, 709–10,) the court reviewed at much length this question. On p. 716 it is said, "We know of no surer guides to the principles of justice than the rules of the common law, administered under a special law, which directs (second section) 'that every petition which shall be presented under the provisions of this act, shall be conducted according to the rules of a court of equity,' and it does not become this tribunal to acknowledge that the decisions of any other are to be deemed better evidence of those rules or the principles of justice." On p. 718 it is said, "It is sufficient for the present to observe, that from the whole scope and spirit of the laws on the subject of Spanish titles, the intention of Congress is most clearly manifested, that the tribunals authorized to examine and decide on their validity, whether special or judicial, should be governed by the same rules of law and evidence in their adjudication on claims of the same given character. The second and third sections of the Missouri act of 1824, the first, sixth, and eighth of the Florida act of 1828, can admit of no other construction. It was within the discretion of the legislature to select the cases to be submitted to either tribunal; they have directed that no claim should be decided on by a special tribunal which is for a quantity greater than one league square; they had reserved to themselves the disposition of those for a larger amount, and finally have devolved on this court their final decision. These are good reasons for the jurisdiction being conferred, but the selection of this tribunal for a final and conclusive adjudication on the large claims, affords neither an indication of the intention of Congress, or furnishes us any reason, that in the exercise of that jurisdiction, we should consider that "the principles of justice," the rules of a court of equity, "the law of nations," of treaties, "of Congress," or of "Spain," the rules of evidence, or the "principles of law," can be at all affected by the magnitude of the claim under consideration. The laws which con-

fer the authority, and point to the guides for its exercise, make no such discrimination, and every 'principle of justice' forbids it."

In Sutherland vs. U. S., (19 How., 364,) it is said: "In construing grants of land in California made under the Spanish or Mexican authorities, we must take into view the State of the country and the policy of the government. The population of California before its transfer to the United States was very sparse, consisting chiefly of a few military posts and some inconsiderable villages. The millions of acres of land around them, with the exception of a mission or rancho on some favored spot, were uninhabited and uncultivated. It was the interest and the policy of the king of Spain, and afterwards of the Mexican government, to make liberal grants of these lands to those who would engage to colonize or settle upon them. The applicant for land usually accompanied his petition with a map showing the natural boundaries or monuments of the tract desired. These were usually rivers, creeks, rivulets, hills, and mountain ranges." * * * "This court has no discretion to enlarge or curtail such grants to suit our own sense of property, or defeat just claims, however extensive, by stringent technical rules of construction to which they were not originally subjected."

In Smith vs. United States, (10 Peters, 331,) it was said: "In thus consenting to be made defendants in equity at the suit of every claimant for land in Missouri, the United States waived all rights which the treaty could give them as purchasers for a valuable consideration without notice. They bound themselves to carry into specific execution by patent, every grant, concession, warrant, or order of survey which, before the 4th of March, 1804, had created any legal or equitable right of property in the land so claimed; so that, in every case arising under the law, one general question was presented for the consideration of the court. Whether in the given case a court of equity could, according to its rules and the laws of Spain, consider the conscience of the king to be so affected by his own or the acts of the lawful authorities of the province that he had become a trustee for the claimants, and held the land claimed by an equity upon it amounting to a severance of so much from his domain," &c. * * * "We have as uniformly held that in ascertaining what titles would have been perfected if no cession had been made to the United States, we must refer to the general course of the law of Spain, to local usage and custom, and

not to what might have been or would have been done by special favor or arbitrary power of the king or his officers."

These liberal rules of construction have been applied in the mass of the decisions on French, Spanish, and Mexican land claims. (U. S. vs. Clarke, 8 Peters, 436; U. S. vs. Huertas, do., 488; U. S. vs. Davenport, 15 How., 1; U. S. vs. Patterson, do., 12; Fremont vs. U. S., 17 How., 543.) In Buyck vs. U. S., (15 Peters, 224,) the court declare: "In all of the decisions of this court upon grants in Florida it has gone as far as the most liberal equity can go in adopting some natural or artificial point in the description of the grants, however subordinate or minor they may have been to give locality to grants." The grant was rejected because of its extreme vagueness. Upon this point the court add: "It is proper for us to remark that in coming to our conclusion upon this point we have not been influenced by any of the English common-law rules which make grants void for uncertainty." * * * "We apply to the case the laws and ordinances of the government under which the claim originated; and that rule which must be of universal application in the construction of grants, which is essential to their validity, that the thing granted should be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony."

In the Fremont case it was said (p. 561): "In deciding upon the validity of a Mexican grant, the court could not, without doing injustice to individuals, give to the Mexican laws a more narrow or strict construction than they received from the Mexican authorities who were intrusted with their execution. It is the duty of the court to protect rights obtained under them, which would have been regarded as vested and valid by the Mexican authorities."

The claim of Clamorgan then stands here to be adjudicated upon the principles of equity and justice. We are not to inquire if it be a legal title but an equitable one. Not if it were a complete perfected grant at the date of the treaty of 1803 but in the language of the Smith case, we are to inquire whether the court can, under its rules as a court of equity, consider that the conscience of the king of Spain had been so affected by the acts of his colonial authorities that he had become a trustee for Clamorgan, and held the land claimed by an equity upon it amounting to a severance of so much from his domain. We are told in the Southerland case that in the construction of this grant we must

not seek to defeat it by "stringent technical rules of construction to which" it was not originally subjected. And in Buyck's case we are told the rules of the common law do not apply, and we must have recourse rather to the rules, laws and customs of Spain and her colonial officers. And in all the cases, at all times, this court has utterly repelled and disavowed, not only for itself but for Congress also, any intention to adjudicate large and extensive grants upon principles and rules of decision less liberal and equitable than those which have founded the adjudications upon smaller grants of like character and merit.

The grant to Don Jacques Clamorgan was an unconditional one. It was not fettered by a single condition for the non-performance of which the King of Spain could annul it. It purports to proceed entirely on past considerations; on services rendered and sums expended for the king. The applicant promised nothing, not even settlements, cultivation or placing upon the lands colonists or emigrants. The only thing looking that way is the closing allusion, in his requette, to building mills and slaughter-houses, keeping cattle and sending meat to the capital. But if this language was not added, simply to explain why he wished his land to embrace in its scope the head streams of the small rivers, as we think it was, then it could only have been used as an inducement to the grant and not as a condition. The answer of the United States treats it only as an inducement, not a condition. (Record, 30.) The Lieutenant-Governor, in his concession failed to annex it even as an inducement. He recurs to the fact that the Governor-General had enjoined upon him the duty of protecting the commerce and discovery of the Upper Missouri in which service the applicant had engaged at his entreaties, the losses such service had occasioned him and the additional expenses he would incur, the importance of continuing such service without making it a burden upon the royal treasury, but rather in a way caculated to open the country to new inhabitants. "For these considerations," he says, "and *on account of the said Clamorgan having rendered himself worthy and deserving of the favors of the Government*, the surveyor of this jurisdiction (as soon as the occupations of his place will permit,) shall survey, in favor of the party interested, the extent of land he solicits, in the way and manner described in the foregoing documents," &c. But the language of the approval

by the Governor-General is conclusive on this point. He refers to an "official note" in which Trudeau had laid before him the motives which induced him to make the grant, and concludes, "All which I do approve, Clamorgan *having deserved* this favor from the Government." If the petition, concession and confirmation stood alone they would suffice to prove a past consideration, an executed contract. The petition abounds with such proof. The first half of it is an eloquent recital of the past considerations founding the grant. He is not telling his tale of wrong to a stranger, but to the ministers of his king who were to consider and act upon the very instrument making the arraignment. And they do act upon it, recognize the truth of its averments and the justice of its demand, and in granting what is asked distinctly base their action upon the past consummated services and deserts of the applicant.

But the petition, concession and confirmation do not stand alone. The principal "director of the company of discoveries" was a person of some figure in his day and generation. He seems to have sustained intimate relations with the Government, and to have had familiar correspondence with its officers. In submitting his claim to the first board of commissioners, he laid before them a number of letters from Carondelet, and one from the intendant, relating to the consideration for the grant. These letters are in evidence, and appear in the Record—with proper translations—pp. 132–138, and we ask the attention of the court to them. They are contradictory on one point alone. Otherwise they harmonize. They show that on the 12th May, 1794, the "Spanish Company of discoveries to the westward of the Missouri" was formed, and that Clamorgan became the head of it, at St. Louis; that as such he submitted plans to the Governor General to further the wishes of the king and advance the interests and development of the province; that his zeal and enthusiasm in such schemes, while they called forth the admiration of the Governor, elicited also expressions of caution; that the company was authorized to arm and maintain forts, raise troops, enjoy a monopoly of the Indian trade with all tribes inhabiting beyond the Poncas, and to receive a reward of $3,000 if it should penetrate to the South Sea; that it was authorized to give presents and confer flags and medals among the Indian chiefs, and generally to keep back and repel the insiduous approaches of the rival English

companies in the Canadas and on Hudson's Bay, which endangered the peace of the Indian tribes, and the ascendancy of Spain over them.

These letters agree with Clamorgan's petition, with a single exception. It alleges that $10,000 a year were promised the company by the king, to contribute to the expenses occasioned by their enterprise. But the correspondence, if we may trust the translations, is not clear on this point. We leave the task of reconciling it, if that be essential, to the court. What we would observe here is only this—that the petition is the last link, but one, in the whole chain of proof, and its allegations are clearly accepted as true and sufficient by the athorities. The only thing subsequent to it is the letter from Morales to Clamorgan, of May 24th, 1797. It is in reply to one from Clamorgan to him of the 15th April, 1797, which probably related to his claim against the treasury of which Morales was the chief. The concession had been made on March 3d, and it is probable, but by no means certain, Clamorgan knew the fact. It had been submitted to the Governor General by letter from the Lieutenant Governor on March 11th, and was by that officer ratified on April 5th. So that if Clamorgan's letter to the intendant of 15th April, was a repetition of the old demand for the $10,000, it would apparently follow he did not regard, nor the Government either, the grant as a payment of that sum. We say apparently follow—for the conclusion would not be a necessary one. For it may have been Clamorgan did not know his petition had been favorably acted on by the Lieutenant Governor.

It is quite certain he could not have known the Governor General had approved the grant, for the approval was only communicated by letter from that officer of April 5th, and could not have reached Saint Louis for at least a month. And the fact is it was not communicated to Clamorgan until July 3d, about which time it is fair to suppose it reached St. Louis. Pending the approval of so important a grant, it argues nothing against the consideration of it that the grantee should still be found making a last effort to obtain his money. No one valued wild lands then and there. But money was so scarce that $10,000 must have been looked upon as a great sum. Before the last board of commissioners, in 1833, the testimony of Jesse Richardson (record, 139 and 140) showed the grant was made in compensation for "what the Spanish Govern-

ment owed him as a reward for his services." The board also had before them (record, 141, 142) the testimony of Charles Sanguinet and James Mackey, contemporaries of Clamorgan, taken in 1817, showing clearly that the grant had been made as a payment of what was due and as a reward for his services. This proof, even in the absence of anything else, then, ought to relieve us of any unfavorable inferences which the letter of Morales might suggest. Don Dehault Delassus was then working lead mines in Upper Louisiana, under a grant made to him for that purpose, was a man of some note, (see 3d State Papers, 694 and 695; U. S. vs. Delassus, 9 Peters, 120,) and why the intendent should at last be willing to abide his opinion on a demand he had so long and persistently resisted, and which it seems had been referred to the king himself (record, 137) for final decision, is a little inexplicable. If the letter relates to the $10,000 alone, which is doubtful, it is more for us than against us, for it at least shows the demand was founded on "the best reasons possible," and that the treasurer had nearly persuaded himself it should be paid. But the consideration, if an executed one, on which a grant has issued, has never been an element of its validity in any court adjudicating the title thereunder. The acts of a public officer in the exercise of a discretion, expressed or implied, are conclusive on the subject-matter, and cannot be impeached collaterally. "If there is a discretion conferred, its abuse is a matter between the governor and his government." (King vs. Picton, Governor of Trinidad, 30 State Trials, 869, 871, cited in Arredondo, (6 Peters, 729,) and other authorities there collected and cited.)

No matter, therefore, if the grant in this case was to reward services rendered or to pay a monied demand liquidated, or both, it is not for an American tribunal to question its sufficiency. If it satisfied Spain it must satisfy her successor. If Spain thought it expedient or politic to give her wild lands, of which she had countless millions of acres, and thus save her money, of which she had little in her colonial treasury, it does not become the United States to sit in judgment upon her wisdom or her policy in so doing. They took the province subject to such legal and equitable rights of the subjects of Spain, and must abide the result. They pledged themselves by the treaty to so abide.

No one can question the discretionary power in the Colonial authorities thus to compound with their creditor or reward great

and acknowledged services: Arredondo case above, p. 729. They were responsible to their king for the abuse of that discretion, not to the United States. The United States now grant their domain in fee upon every species of consideration. Can any one say that their successors in the sovereignty can ever pass judgment upon the exercise of their discretion in doing what they will with their own?

Wild land in 1797 was destitute of monied value in Missouri. It is doubtful if Clamorgan, after his grant had been confirmed, could have sold it for any monied price at all. Who was there to buy from him when Spain freely gave to all who would apply? An examination of the following will show how cheap wild lands were about that time, or later, in the province of Louisiana: Strother vs. Lucas (12 Peters, 447); 1 Martin's Hist. La. 204–5, 255; 2 do., 125–6; Menard's Heirs vs. Massey, 8th How., 304; Monette's Hist. Valley of Mississippi, 2, p. 562; Breckenridge's "Views of Louisiana," 143. In Stoddard's "Sketches of Louisiana," 249, he says, "About the year 1796, Spain found it necessary to populate Upper Louisiana, as a barrier to the English in Canada, and she gave great encouragement to settlers. She preferred those from the United States, as their prejudices against the English were a sure guarantee of their attachment to the Spanish interest. Lands were gratuitously given them, and they were exempted from taxes. The fees of office and the survey of eight hundred acres cost forty-one dollars only, exclusive of the hire of chainmen. To these expenses must be added the fees of confirmation at New Orleans."

Many of Morale's sales of the fine lands in Lower Louisiana, near New Orleans, made from 1803 to 1810, were at prices as low as three and four cents per arpen. (See a list of such sales in 3d State Papers, 58, 59.) Nearly every decree in this court confirming grants in Louisiana, under the act of 1860, has been rendered on claims founded on these sales.

The grant to Clamorgan was substantially a complete grant. It was an executed, not an executory contract. The committee of the Senate, whose report appears in the Appendix, so regarded it. There was no survey under Spain, and has been none under the United States. But if the grant locates itself by defining the lands, with reasonable accuracy, survey is dispensed with under the act of 1860, (Secs. 1, 6, 11), and was under the act of 1824,

(Secs. 1, 6, 11; see also Mackey vs. U. S., 10 Peters, 342; Smith vs. U. S., do., 333; Wherry vs. U. S., do., 338; Chinoweth vs. Haskell, 3 Peters, 92; U. S. vs. Sibbald, 10 Peters, 324; U. S. vs. Davenport, 15 Howard, 1; U. S. vs. Patterson, do., 12; U. S. vs. Perot, 8 Otto, 428.) These authorities show mere want of survey is no objection to a claim otherwise valid.

Survey in this case was not a condition precedent or subsequent. If any obligation to survey existed it was laid upon the "Surveyor of the jurisdiction" by the provisions of the grant. But even he was not required to make it at any particular time—but "when the occupations of his place should permit." We could cite authorities without end, from histories, reports of commissioners, and decisions of the courts, to show that the actual survey in the field, of this immense tract, at any time prior to the American occupancy in 1804, would have been attended with great danger from Indians, great expense in money, and great difficulty in obtaining surveyors to do the work. But we forbear to swell a brief, already too long, with such unnecessary labor, for we hold that under the peculiarity of the grant no survey at all was required of the *grantee* by the concession, and if it had been that it was dispensed with by the Governor General and the grant made absolute and final by him without it. By act of 26th March, 1804, section 14, (2 Stat., 283,) it was made a crime, punishable with fine and imprisonment, for Clamorgan himself to have thereafter surveyed his land. And by act of 28th February, 1806, section 3, (2 Stats., 352,) it was made the duty of the commissioner before whom we have seen the grant was filed in 1808, to have ordered a survey, at the expense of the grantee, if such survey were necessary to enable them to decide upon the claim. And had they so ordered, the law made it the duty of the Principal Deputy Surveyor, provided by section 1, to have made and returned the survey to the Surveyor General. This was not done, hence, in all decency, the want of survey should have ceased to be constantly urged against the title by those commissioners and Congresses which subsequently repudiated it.

We have said the grant was unfettered by conditions of any kind. If this is not plain enough on its face we respectfully invite the attention of the court to the cases referred to in its decision in the recent case of McMicken vs. U. S.. (7 Otto, 215). We might add Fremont's case, (17 How., 543); Drummond's case, (13

Peters, 84); Burgevin's case, (do., 85); Mills' case, (12 Peters, 215); Kingsley's case, (do., 476). These authorities settle it that no conditions were annexed. If survey had been intended as a condition by the Lieutenant Governor, the Governor General dispensed with even that. If the building mills and slaughter-houses were conditions at all and not inducements, they were not annexed by the Lieutenant Governor, or even referred to by the Governor General.

It has been shown that at the dates of concession by Trudeau, and the approval of Carondelet, those officers constituted, in the province of Louisiana, the competent supreme power, under the laws and customs controlling the subject matter, to make the grant. Their acts were conclusive on the King, and of course are so on his successor. By the royal order, of October 15th, 1754, the King had, for proper reasons, declared that, in future, the governors should have the power to grant untrammelled by the condition of confirmation by him, (White's Recop. vol. 2, pp. 62 and 67).

Now it has never been contended that Spanish grants in Louisiana, Florida, or California, depended for their validity or division into classes, upon the formalities with which they were made, or the mere words in which they were expressed. Their validity and character have been determined by a reasonable construction of the instruments issued under the colonial authorities, attesting the right, and the sense in which those authorities regarded it. Take, for instance, the *approval* by the Spanish governor in Florida, of the Indian grant to Panton, Leslie & Co., (Mitchell vs. U. S., 9 Peters, 711); the *contract* between Spain and Maison Rouge, (U. S. vs. King, 7 How , 857); the *contract* between De Bastrop and Spain, (U. S. vs Philadelphia and New Orleans, 11 How., 610); and the grant of the *mere right to cut timber* on certain land, (U. S. vs. Richard, 8 Peters, 470); in these cases these approvals, contracts, and special privileges, have been construed here to mean complete grants of the royal domain, and nothing less. After the treaty of 1803, Morales, the Spanish intendant, still continued to grant and sell the crown lands in West Florida, extending, as Spain held, to the Mississippi river. His titles, and especially his sales, began about that time to attain formality. He was an exact, conscientious man, and his grants were formal, and according to rule. The grant in the Lynd case, (11 Wal., 632), was one of

these. Many others, equally as formal, have come before the court under the act of 1860.

But in 1797, especially at the remote interior posts, there were no established forms and precise words employed in making grants. This is too well established to need authorities. An examination of any half dozen titles from Missouri, Arkansas or Louisiana, coming here under the land legislation, will show this. In the Smith case the whole title consisted of the single word "granted," written by Carondelet at the foot of the petition, (10 Peters, 328.) Take the concession, order of survey, permission to settle, or grant, in any half dozen cases, and in all they will differ in form. In the case at bar, then, we are justified in discarding questions of form and looking to the substance and intents of the muniments of title. Now in his petition Clamorgan described the land by natural objects so far as he could, and then laid down a rule by which the surveyor might locate the only doubtful line, viz: the rear; for he knew the *custom* of the province would require a survey before he could hope to obtain from Carondelet a complete grant. We say, custom, because the governor general could of course in a special case disregard the custom and annex the fee by his ratification, without survey. This he often did where islands, cypreries and vacheries were prayed for or other parcels of land capable of identification without survey. But the *custom* made surveys a preliminary of the final act of granting. Hence Clamorgan anticipated the need of a survey in his case, and told how it was to be made in precise terms. Trudeau attests this fact and this custom, in his concession, by telling the surveyor to survey the land, when time permitted, "in the way and manner described in the" petition, and by declaring further, that such survey, and the certificate attesting it, with the concession, would have to be laid "before the General Government of the provinces, in order to get its approbation and record." Now what we contend is that this "approbation and record" of the General Government, was afforded without the survey, and with what appears to have been a glad alacrity on the part of such General Government, "Clamorgan having deserved the favor from such Government," as the governor declared. Trudeau laid before the government the fact of the grant and his motives in making it. These were satisfactory. The governor uses the very words, "the motives which induced you to grant to Mr. Clamorgan the tract of land," &c. And he adds: "All which

I do approve, Clamorgan having deserved this favor from the Government."

After this, what use was there for a survey of the grant? The highest authority had "approved" the grant, and the motives on which Trudeau had made it. It defined itself beyond peradventure, and the governor, in his confirmation, had himself described the land, as a survey would have done, according to the custom. But the governor saw plainly enough no survey was absolutely necessary in that particular case, and it was entirely competent for him to dispense with it if he saw proper. His language must be understood as confirming the grant, because it was a *grant* he declared Clamorgan had deserved. Trudeau took that view of the governor's action; for, in telling it to the grantee, he says he does so for his "knowledge and government." Here, then, was a petition for land described so well no survey was essential; there was the concession and order of survey; there was the reference of the concession to the governor or supreme authority; and there was the final ratification of all that had been done; and all of which was officially and formally transmitted to the party interested for his "knowledge and government." How could anything more be necessary? The governor said he confirmed the *grant*, and that he did so because the grantee deserved it. Could he have done more in more formal terms? Will the court, sitting in equity, trying this title under the rules of "equity and justice," say that this did not, substantially, vest in the creditor of Spain the title to the thing he was willing to accept in lieu of his monied demand? We have shown this question is not to be solved by the rules or principles of the common law, but by the laws, customs, and usages of Spain. What Spain would have done we bound ourselves by treaty to do. Can any one believe Spain would have disavowed the acts of her authorities and ignored the grant? If she would not, then the United States, in equity and justice, should not.

The answer of the United States (Record, 29,) pleads, as a defense, the acts of Spain in ignoring the grant, because she made "repeated grants of large tracts of land," * * "within the boundaries of the alleged grant to said Clamorgan," *after* the date of said grant and before cession to the United States. Also the fact that the United States, their commissioners, agents, &c., had never "recognized the alleged grant to said Jacques Clamor-

gan as a valid grant or claim either in law or equity, but have constantly repudiated and ignored the same by act of Congress, by unfavorable report and rejection of the claim when presented for confirmation, and by the recognition and confirmation of a large number of *junior* grants and claims within the boundaries claimed by the said petitioners!" Strange logic this. Can the court countenance such defences in a government of constitutions, laws and treaties? They would have been discountenanced in a monarchy. In a republic like ours they are inglorious. Show that our grant is a forgery, that those who made it exceeded their authority, that the plaintiffs have not succeeded to the rights of the grantee, show any or all of these or other honorable defenses, if you can, but do not insult us, and the republic too, by telling us that despite our constant claim and entreaties, the government has extinguished our rights "by repudiating and ignoring them," and granting our lands to claimants under *junior* titles! This logic is borrowed from the report of the board of commissioners heretofore dwelt upon by us. (8 State Papers, 20.) They go to pains to show that before the grant to Clamorgan the authorities had granted some trifling amount of land, less than two thousand acres, in supposed conflict therewith and that subsequent to the grant, the successor of Trudeau made other and extensive grants in conflict, and that still later the United States had made sales, donations, and confirmation of settlement rights, also in conflict. Now if there were any legal force in all this it would go for naught, because—

1st. There is no proof of such facts in the record.

2d. Such alleged conflict of previous and subsequent grants, sales, donations and confirmations, is predicated by the board, wholly upon the location of the claim represented by their self-created map to which they refer, and which accompanies their report.

Their extravagance in building such an argument, backed with tabular statements, exhibits, &c., upon such a foundation, only serves to reveal the extremes to which the agents of the government have customarily resorted in order to violate the plainest rights. If it required any reply it will be found in the Senate report on the claim, printed in the appendix hereto.

Incredible as it may appear the board actually predicate nullity of Clamorgan's grant, because of subsequent grants in sup

posed conflicts, but legality of those as to which Clamorgan is subsequent! Grants subsequent to Clamorgan's are better than his because subsequent. Grants as to which he is subsequent are better than his too, because he is subsequent to them! They reverse every rule of law and right; they ignore the logic of their own arguments. In the language of a great and good lawyer, in the celebrated Perchman case, we are tempted to exclaim, "Perfidy often wears the mask of subtlety, as well from shame as cowardice; but it is seldom that the counsellors of bad faith, if they condescend to argue at all, are satisfied with a defense so feeble." (7 Peters, 65.)

It would be easy to show, by reference to the State Papers and other accessible sources of proof, that all the grants by Spain, subsequent to Clamorgan's, were mere floating general concessions to be located wherever the claimants desired, and were accompanied by express conditions that they were not to prejudice pre-existing titles. But we consider this unnecessary, for several reasons, the principal being that the parties have agreed (record, 169) that all the lands possibly in conflict covered by the grant, however it may be located, have been disposed of adversely to the title of the plaintiffs.

This brings us to the last question raised on the record, viz:

If the grant is valid, and should be confirmed, are the appellants, Henry Clamorgan, Leon A. Clamorgan, and Julius Clamorgan, the legal representatives of the Spanish grantee, and as such entitled to the benefits of a decree of confirmation?

We assume that under the act of 1860 the court will be guided by the rule, as to its action on derivative claims, established by its adjudications under the Missouri, Florida, and California acts. That rule is briefly this: That the Federal courts, under these land statutes, acquire jurisdiction of questions arising among adverse claimants of the land sued for, in a given case, no further than is necessary to see that the petitioners so connect themselves with the grant as to show an interest in establishing the title against the government. The principal question is the validity or invalidity of the grant as against the successor of its parent colonial government. As to who will benefit by the confirmation in a given case, that is a question in the decision of which the United States can have no interest.

These views are abundantly supported by the opinions of the court in the following cases: from Florida—U. S. vs. Perchman (7 Peters, 51); U. S. vs. Chaires (10 Peters, 308); from California—Castro vs. Hendricks (23 How. 442); Brown vs. Brackett (21 Wall. 388); from Missouri—Conoyer vs. Schaffer (22 Wall., 254); from Louisiana—U. S. vs. Patterson (15 How. 12); McMicken vs U. S. (7 Otto, 208;) U. S. vs. Inerarity (19 Wall. 595); U. S. vs. Watkins (7 Otto, 223). In the Perchman and Patterson cases the rule was stretched to its utmost tension. In McMicken and Watkins it was relaxed somewhat. In the case at bar there are rival claimants. The lands are claimed by the heirs of Labeaume and the heirs of Clamorgan, and, as among the latter, three claim to the exclusion of a fourth. This is all particularized by the statement of the case. How far should the court look into and decide these adverse pretentions? It is nothing for the defendant government that the Labeaume's right is paramount to that of the Clamorgans; or that among the latter three own the land to the exclusion of a fourth. If the petitioners show such an interest in the whole of the land that a decree affirming the grant will operate to perfect that interest, then they are entitled to such decree. But as between themselves they have, by sueing on their rival pretentions and submitting the evidences thereof to the Federal courts, tacitly agreed to abide their decision upon any conflict of right such evidences establish. None of the cases above cited are analogous to this in that regard. The United States has pleaded the outstanding title of the Labeaume heirs as a defence in the Clamorgan suit. They have thus admitted that whatever title is out of Spain by the grant is in the Labeaumes by mesne conveyances. Hence we have only to show that the grant is valid as against the United States, and to *identify* those heirs. This, we think, we have done. We have done more. We have acquired the title thus pleaded against us by purchase. And we are in a position, under the preceding decisions, to claim a confirmation in our own names, or in those of our vendors, the heirs of Labeaume.

The grantee sold the lands on 20th October, 1813, to Tholozan, (Record, 144) and he sold on the 24th of the same month and year to Cyprian Martial and Maximin Clamorgan, (Record, 148.) This latter deed was recorded at Saint Charles on the 14th October, 1816, (Record, 28.) But on the 9th of May, 1816, Tholozan

had conveyed the same lands, (Record, 152,) in good faith, and for value, to Louis Labaume, who recorded his deed at St. Charles on the same day. (Record, 153.) Henry, Cyprian, Leon A. and Julius Clamorgan, claiming as sole heirs and legal representatives of Cyprian Martial and Maximin, filed their suit in the district court praying confirmation and all its just fruits. Afterwards, on the 9th June, 1875, (Rec., 45,) the heirs of Louis Labeaume filed their petition, claiming the same lands by virtue of the sale to their ancestor. On December 6, 1875, the United States filed their answer to the Clamorgan petition, (Record, 27,) and pleaded as a defense the sale to Labeaume, (as above stated,) and of course if that sale were legal it defeated the right of the plaintiffs claiming under Cyprian Martial and Maximin. Afterwards, on the 13th June, 1876, the heirs of Labeaume sold their claim to Henry, Leon A. and Julius Clamorgan, for value and in good faith, (Record, 154,) Cyprian Clamorgan refusing in such way to recognize their right or to expend money to acquire it. Their suit against the government had been, on 2d May, 1876, consolidated with that of the Clamorgans, (Record, 31,) and as thus consolidated they went to trial. The judge took no notice of the conflict, but made a decree in favor of all four of the original Clamorgan claimants, (Record, 36,) without prejudice to the rights of any, and with the declaration that it was only *pro forma*.

These four original plaintiffs deduced title as heirs of Cyprian Martial and Maximin, and three of them united to their right as such the outstanding right of the heirs of Labeaume. If, therefore, the right of the Labeaume heirs was a better right, under the laws of Missouri, than that of the Clamorgan heirs, the judge below should have rendered a decree recognizing Henry, Leon A. and Julius alone, excluding Cyprian, and this court should now do the same thing. If it is not the better right, then the judge below should have done as he did and this court should affirm that part of the decree recognizing the four as the legal owners of the land, and fixing the ratio of their interests. It should also fix the amount of land to be that shown on "New Plan F."

By act of 26th March, 1804, sec. 12, (2 Stat., 283,) the part of the province of Louisiana north of the 33° of north latitude was erected into the District of Louisiana, and the governor and judges of the then Indiana Territory were vested with legislative powers over it; the governor being the executive authority. By sec. 13

it was made his duty to divide the district into as many smaller districts as convenience might require. By proclamation of

this was done, and the whole region was divided into six districts, viz., Saint Charles, Saint Louis, Saint Genevieve, Cape Girardeau, New Madrid, and Arkansas. And see, for limits of such districts, Stoddard's Sketches of Louisiana, 222, and *ante;* Breckenridge's views, 112 and 115. The laws made and promulgated by the said governor and judges are found in "Laws of Louisiana and Missouri to 1824," vol. 1, p. 15 to 67. On p. 47, sec. 8, it is declared: "All deeds and conveyances which shall be made and executed within this district of or concerning any lands, tenements, or hereditaments therein, * * * shall be recorded in the recorder's office of the district, where such lands or hereditaments are lying and being, within twelve months after the execution of such deed or conveyance, and every such deed and conveyance that shall, at any time after the publication hereof, be made and executed, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance be recorded, as aforesaid, before the proving and recording of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim."

By act of March 3d, 1805, (2d Stats., 331,) the District of Louisiana was changed to the Territory of Louisiana, and its legislative powers vested in a governor and judges, provided to be appointed for the same by the President. They seem to have entered upon their duties in 1806; the laws passed by them appearing on pp. 67 to 254 of the volume above referred to. Section 9 of the act continued in force the laws passed by the governor and judges of the Indiana Territory until altered, modified or repealed. The new legislative authority acted until 1813, when it was supplanted by a regular territorial form of government under the act of June 4th, 1812, (2 Stats., 743.) Their laws did not change the districts referred to, nor create any counties, nor in any manner modify or repeal the law affecting the recording of deeds quoted by us. The new legislature, under the act of 1812, went into operation in 1813,

and the laws passed by them from time to time are to be found on pp. 255 to 627 of the same volume. On pp. 293 and 294 will be found an act passed and in force on 31st ~~September,~~ December, 1813, creating, among others, the county of St. Charles.

It is clear it, and the former district of St. Charles, included the land granted to Clamorgan. Thus it appears that when the conveyance from Tholozan to Cyprian Martial and Maximin Clamorgan, was executed on the 24th October, 1813, (Record, 148-50), the law required it to be recorded in the District of St. Charles, in which the land was situated, within one year from its date, and denounced against it absolute nullity as to any subsequent sale to a *bona fide* purchaser, for value, unless it was recorded prior to the execution and recording of such subsequent deed. We find the subsequent sale to Labeaume was made on the 9th May, 1816, at Saint Charles, and there recorded on the same day. But the prior sale to the Clamorgans had not then been recorded, and was not until the 14th October, 1816, (Record, 150). It was recorded in the county of Saint Louis on the 9th May, 1816, but the lands were not situated in that county, and hence Labeaume could not have been expected to take notice of such record. He knew the law, we may presume, and finding the conveyance from the Spanish grantee to Tholozan, of 20th October, 1813, on record, (Record, 145), and no transfer from Tholozan to any one else, he had a right to conclude as he did that he was safe in paying his money and in taking the deed. These laws were constitutional, were appropriate to the object intended to be attained, viz: the security of land titles, and development of the country, and as they impressed a certain status upon the lands in question they should be enforced by this court.

We have, therefore, shown a conveyance of the lands sued for from the grantee to Tholozan, from Tholozan to Labeaume, and from Labeaume's heirs to Henry, Leon A., and Julius Clamorgan. In the names of the last three we ask a decree comfirming the grant according to the limits shown by Plan F, and entitling them to an equal amount of land subject to entry at $1.25 per acre. If the deed from these heirs to the Clamorgans is not satisfactory, then we ask that the decree be in favor of said heirs, to wit:

James L. Huse, administrator of the estate of Henry T. Blow, jr., deceased, for three twenty-fourths of the whole;

Socrates Newman for one sixth part;

Adele Labeaume for one sixth part;

Louis T. Labeaume for one thirtieth part;

George Labeaume for one thirtieth part;

Louise Labeaume Tompkins, widow of William Tompkins, deceased, for one thirtieth part;

Edmund Labeaume, a minor, for one thirtieth part;

William Labeaume, a minor, for one thirtieth part;

Eugenia O. Harris, formerly *Eugenia O. Labeaume*, for one eighteenth part;

Mary E. Labeaume for one eighteenth part;

Susan L. Labeaume for one eighteenth part;

Augustus Jacobson for one twenty-fourth part;

Noemie Labeaume Hicks, executrix of Louis A. Labeaume, commonly known as Alexander Labeaume, deceased, for one sixth part.

If the conveyance be held valid against a part of the heirs of Labeaume, and not all, then we ask that the decree be in favor of the three Clamorgans, Henry, Leon A., and Julius, for the interests in said lands pertaining to such part, as shown in their petition, and in favor of the other Labeaume heirs for the residue.

But if the Court be of opinion that the validity of the grant alone can be adjudicated and not the adverse claims between the petitioners, then we ask that the decree here be in favor of Don Jacques Clamorgan and his legal representatives, leaving it to the local tribunals to ascertain them.

CONCLUSION.

In conclusion, we beg leave to remind the Court that the grant to Clamorgan, whether complete or incomplete, was fully protected by the treaty of 1803, and was wrongfully excluded from the benefits of an adjudication by the courts from a sense of jealousy in the political department of the government.

The agents of that government have opposed it from time to time, without adducing any just grounds for such hostility. In consequence of all this the valuable lands covered by it have long since been disposed of and are now totally beyond the reach of the heirs of the grantee. They were chiefly sold for cash, at $2 per acre, and the proceeds have remained in the treasury for the last half century.

At every stage of these proceedings the grantee or his heirs have pleaded and remonstrated, but in vain. Their feeble voices were never heard in Washington, or if so, were silenced by the clamors of the horde of settlers upon the lands who wielded, through their votes, an influence not to be resisted in those early days.

At no time, and under no circumstances, have the despoilers of these unfortunate people ever been able to adduce any evidence impeaching the entire *bona fides* of the transaction. On the contrary, the admission was wrung from them on more than one occasion, that there never was a circumstance on which to hang a doubt that all was fair, honest, such as it should be and as it appeared to be.

The lands granted to Clamorgan, now more than eighty-two years ago, have become of increased value, through no act of the claimants, it is true. But even in a state of wildness they

would be ten or twenty fold more valuable than the refuse lands of the Government to be given in lieu of them and which remain unsold because they have not heretofore brought $1.25 per acre at public offering.

For the first time in its history the grant is before an American Court of justice, now to be adjudicated as between man and man, upon principles of equity and justice. Its great extent has hitherto been its chief misfortune, but that ground of distinction cannot be pleaded or will not be countenanced here. In the language of this Court in the leading Arredondo case, "the laws which confer the authority and point to the guides for its exercise, make no such discrimination, and every "principle of justice" forbids it.

J. L. BRADFORD,
A. D. ANDERSON,
DRUMMOND & BRADFORD,
Solicitors.

APPENDIX.

32D CONGRESS, 1st Session. } SENATE. { REP. COM. No. 354.

IN THE SENATE OF THE UNITED STATES.

AUGUST 28, 1852.—Ordered to be printed.

Mr. HALE made the following

REPORT:

[To accompany bill S. No. 551.]

The Committee on Private Land Claims, to whom was referred the petition of the legal representatives of James Clamorgan, deceased, late of Missouri, praying the confirmation of a grant of land made to said Clamorgan by the Spanish authorities, prior to the transfer of Upper Louisiana to France, and from France to the United States, have had the same under consideration, and beg leave to submit the following report:

That it appears, from the petition, that this claim is to a certain tract of land lying and being in the counties of St. Charles and Lincoln, in the State of Missouri, and is set forth as described in the grant, as follows, to wit: bounded on the east by the Mississippi river, running from a point sixty arpens north of the mouth of the river Cuiver to a point sixty arpens south of the mouth of the river Dardenne, on the bank of the Mississippi river; on the north and south by two parallel lines drawn due west from each of said points, and extending two hundred arpens beyond the foot of the first bluffs; and on the west by a line connecting the two extreme points; the superficial contents of which have not been precisely ascertained, but is represented to contain about five hundred thousand arpens.

This is purely a legal and equitable claim, arising under the laws and customs of the Spanish government in relation to their land systems in their colonial possessions, and the obligations of

this government arising under the treaty of cession to respect them. The claim is too large to appeal to sympathy, however meritorious the petitioners may be, and must stand or fall upon its clear legal and equitable merits. It is in this view your committee have examined it, and now proceed to submit the result of their investigations.

This claim is founded upon a *concession* made of said tract of land, in pursuance of a petition specially describing it as above set forth, only more specific, by Don Zenon Trudeau, lieutenant governor of Upper Louisiana, to Don Santiago Jaques Clamorgan, and his heirs, *for a valuable consideration*, and subsequently approved by the Baron de Carondelet, governor general of Louisiana, as appears by the petition, concession, and correspondence in document A, appended to this report, and submitted as a part of it. The concession bears date March 3, 1797, and the ac-
2 knowledgment of the receipt of the approval of the Baron de Carondelet, July 3, 1797; all of which appears in document A, above referred to, being copies from the recorder's office of St. Louis, and printed in Senate Document No. 16, first session of the 24th Congress.

It appears that this claim was duly and properly laid before the first board of commissioners created under the act of Congress to examine and report upon claims in Upper Louisiana, and was, in 1811, passed upon and disposed of by the following dictum, unaccompanied by any reason whatever: "It is the opinion of the board that this claim ought not to be confirmed." It was again laid before the board created by the act of 1832, and in 1833 met with a like fate, for the assigned reason that they, (the board) did believe that it was disregarded by Trudeau, the grantor, and Delassus, his successor in office; a reason founded upon no assigned fact, that your committee can perceive, and must rest solely upon vague speculation, arising out of conflicting claims upon the same locality, in the absence of an actual survey to designate it.

That some grants were located, both before and after the Clamorgan grant, within its prescribed limits, is very true; but your committee are slow to believe that that circumstance alone, in view of the facts of the case, sustains the conclusion of the board, that this claim was disregarded. This grant was not surveyed, and, by the very terms of the grant itself, was not required to be surveyed, "until the occupations of the surveyor general would

permit" the survey to be made; hence it could not be ascertained whether these subsequent grants were within the limits or not. The very form and manner of making the conflicting donation grants, as shown in the report of the commissioners, is an argument against the assumption that the officers granting them intended to disregard the prior grant of Clamorgan, founded, as it certainly was, upon a *bona fide* consideration. These petitions for donations of land were in their very nature vague and indefinite, generally asking for a grant of land in some specified section of country on which to make a farm, &c., &c. The concession in response concedes them the land asked for, and directs the surveyor to put the party in possession of the same, provided the land belonged to the King's domain, and did not interfere with others. This was the usual form, and demonstrates upon its face that the lieutenant governor could know nothing of such conflicts, and consequently could not have intended to disregard a prior grant, founded upon a *valuable consideration.* And the surveyor general himself could not have known when he came in conflict with this claim, as it had not been surveyed, and by the very terms of the grant was not required to be surveyed until a future time; which future never came to Clamorgan, as the change of government to some extent defeated it; for your committee cannot shut their eyes to the historical fact. that almost from the time of the consummation of this grant, until the final settlement of the title to Louisiana in this country, the government of it was in the almost constant process of change—first from Spain to France, and from France to the United States—greatly embarrassing claimants in perfecting their titles by surveys. That as soon as the United States purchased it, they, by an act of Congress of March 26th, 1804, prohibited, under severe penalties, all surveys, all taking possession of claimed lands, all marking of trees or designating of lines, &c.; thereby putting an absolute check upon the process of maturing inchoate titles. The want of a survey, and the conflicts growing out of it, should work no injury to the grantee, where it was deferred for convenience by the government granting, and absolutely prohibited by the government succeeding to the possession.

But a survey was not absolutely necessary to the validity of a grant, as your committee conceive is well established by the Supreme Court. The only object of a survey is to ascertain the land;

and if this is ascertained by the grant, referring to such objects as are natural boundaries and imperishable monuments, it is better established than could be done by any artificial lines. "The grant itself," say the Supreme Court, "is contained in the one word *granted*, which must be referred to everything prayed for in the petition." (10 Peters, 332.) "It has also been distinctly decided," say the same court, in the Florida cases, "that the land claimed must have been severed from the general domain of the King *by some grant which gives it locality in its terms by reference to some description*, or by a vague general grant, with an authority to locate afterwards, by a survey making it definite." (10 Peters, 331.) Again, the same court say, "that where the grant was specific, a survey might be made after the time fixed by the treaty; and where the grant was vague, or contained an authority to locate, which was executed by a survey made before, *it was valid*." That is, where the grant was specific—that is, within a specified locality, calling for objects of boundary which were permanent or imperishable—a survey was not necessary to give it validity, because the specific character of the grant severed it completely from the King's domain; but where it was vague and uncertain, it had to be made certain by a survey. This is the clear distinction made by the court, and is more fully illustrated in the case of the heirs of Arredondo *at al.*, in 13 Peters, 134, where this whole doctrine was brought into requisition. That was a case for thirty thousand arpens of land in Florida; was an inchoate grant, and without a survey; and they confirm it upon the ground of its being a specific grant. Now, your committee will contrast this with the Clamorgan case, which has equal merits in every other position, as they believe it has also in this. The description is taken from the decision of the court itself, where they say: "But this concession calls for a natural object—a creek—and is designated as beginning on the creek, about seven miles west of an Indian town called Alligatortown. A survey may then be made so as to give the appellees the benefit of the concession, according to the description in the petition, supposing that Alligator creek exists, and Alligatortown can be found." This is a case confirmed on the special ground of a specific location, a survey not being necessary to its validity.

Now, your committee would contrast the specific character of the Clamorgan grant, not only specified in the petition but in the

grant, and in the approval of the grant by Baron Carondelet. In the petition of Clamorgan, this tract or tracts of land are described as follows: He asks for a "grant on the western side of the river Mississippi, some leagues above the mouth of the Missouri; the tract of land bounded on one side by the little river called Lacharette, *alias* Dardenne, and on the other by the little river called Au Cuiver: one on the south, the other on the north, will serve as boundaries to those two sides. The petitioner wishes, moreover, that you would be pleased to grant to him sixty arpens of land in front on the banks of the Mississippi, immediately adjoining the mouth of the first above-named river, Lacharette, in descending the current of the Mississippi; and again, sixty arpens in front, also on the banks of the Mississippi, adjoining immediately to the upper side of the mouth of the second above-named river, Au Cuiver, and ascending the current of the Mississippi. The depth of the three different above-described tracts of land to be extended by two lines, starting from the banks of the Mississippi—one from the most southern, the other from the most northern point (of the front) of the above demanded tracts; which two lines shall be run parallel on each side in a westerly direction, until they reach the top of the high hills in the rear; and from there the said two lines to be continued and prolonged, in the same westerly direction, until they reach a point at the distance of about two hundred arpens from the foot of said hills; and then those two extreme points shall be connected together by a straight line, which shall be run so as to form the fourth side of the said three tracts here above demanded. The said lines encompassing in their extent all the waters of the above-mentioned rivers Lacharette, *alias* Dardenne, and Au Cuvier," &c. The Baron De Carondelet, in his approval, abbreviates the description, but retains every essential point, as follows: He speaks of it as "the tract of land situated between the two rivers Charette and Cuiver, both emptying into the Mississippi; also sixty arpens to the north and sixty arpens to the south of said rivers, which serve to determine the situation of said land, having the Mississippi in front. Two parallel lines are to be drawn, running in the interior of the country, until they reach at a distance of two hundred arpens beyond the foot of the first hills, conformably to the solicitation of the party," &c.

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The essential points in the specific description in the Arredondo

case are Alligator creek and Alligatortown, and only one point given—the commencement on the creek, seven miles from the town, a town so insignificant that doubts seem to be expressed about finding it. In the other case we have the Mississippi river as the front or base line on the east; we have the Dardenne and Cuiver rivers north and south in the tract; we have the first hills or Mississippi bluffs on the west: a combination of imperishable and unchangeable monuments of boundary, rarely to be found in any grant. Besides, in the Arredondo grant no lines are given: it is merely to begin on Alligator creek, near Alligatortown; in this case all the lines connecting the natural and imperishable objects are defined specifically. The rule in the former case was, that it was specific enough to allow a survey to be made, so as to give the parties the benefit of their concession. If it was so in the former, how much more so is it in the latter case, where every natural boundary still stands, and every line can be run upon the distinct description amongst them, both in course and distance. The grant, then, being specific, no survey was requisite to its validity; and this disposes of the chief objection of the board of commissioners. The court dispose of their other objection in the same case, to-wit: that prior grants within a specific grant does not invalidate the specific grant, but only subjects it to the loss of the land holding such priority in point of time.

But suppose the lieutenant governor did attempt (of which 5
we find no evidence) to disregard this grant, and, in the arbitrary spirit of the government he represented, sought to gratify whims by making and unmaking titles. Where was his power to do so? Whence did he derive his authority? Spain was a government of laws, and in her land systems for her colonial possessions had a fixed and definite code. He had power to grant by the laws and regulationa, and they were his guide; but where did he derive the power to disregard a grant once made, upon a valuable consideration, and destroy a vested right once established? We know of none—even if the facts in the case warranted such an inference, which we conceive they do not. The first board of commissioners acted more wisely; feeling the same laudable anxiety to protect the settlers on this grant, and knowing of no sufficient reasons, founded in evidence, for the opinion, they disposed of it by a mere dictum.

But even the last board of commissioners who rejected it in their

report to the Commissioner of the General Land Office, hold towards it the following strong language in support of its authenticity and validity:

"The board take this occasion to say, that the concession to Clamorgan, and the accompanying documents which have been presented to them, give no evidence of being surreptitious, and they feel fully convinced that it was the intention of the government of the country to make the claimant compensation for his expenditures in maintaining a military force to protect the trade on the Missouri; but it is evident from subsequent acts of the same officer who made the grant, and his successors, that there must have been some further procedure in relation to the claim, which has not been brought to light before any of the tribunals of the government appointed for the adjustment of land titles; and it is further evidenced by the acts of the surveyor general of Upper Louisiana, (an officer known to be punctilious in the discharge of his duty,) that he never could have been notified by Clamorgan of his grant, or the surveys under his jurisdiction, subsequent to the date of this grant, would not have been permitted, and the lieutenant governor would have been notified by the surveyor of the interference of Clamorgan's grant—of the seven claims previously granted and surveyed. These circumstances induce the board to believe that the claimant abandoned his claim with the knowledge of the officers, to seek remuneration otherwise, or has been guilty of a neglect of his privileges under the grant, which would amount to a forfeiture. The board, therefore, could not recommend this claim for confirmation, believing that, had the government of Spain been continued over this country to this day, the tract, as designated, would not be confirmed to the claimants; but is is more than probable that if the remuneration had not been made, which seems was intended by this grant, a location might be permitted in some part of the domain where it would not be prejudicial to others."

This argument does not strike your committee as sound. The premises are that the grant was genuine, "not surreptitious;" that it was made for a valuable consideration, in payment of a crown debt, both for services rendered and money advanced to maintain the military possession of the country; and the deductions are, that as people have gotten on the land with some interfering donation grants, and the surveyor, who never surveyed this grant, surveyed them, they, the board, must suppose that "some

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procedure in relation to this claim, which has not been brought to light," must have taken place to vitiate it. And again, though they, the board, "feel fully convinced that it was the intention of the government of the country to make the claimant (through this grant) compensation for his expenditures in maintaining a military force to protect the trade of the Missouri," yet "they could not recommend this claim for confirmation," because they believed, "had the Spanish government continued, it would not have confirmed it, as designated," but would have probably remunerated the claimant by a location on some other part of the public domain, where it would not be prejudicial to others." In short, the board find the grant and all the documents *genuine;* that it was made for a *valuable consideration;* that it was given as a compensation for services and money advanced for the government to maintain her military possession of the country and protect the trade of the Missouri; that the Spanish government, had it continued, would only, in their opinion, have confirmed it in a different location, "where it would not be prejudicial to others;" therefore they think it should not be confirmed at all, because there might be something "which has not been brought to light;" showing that it was subsequently disregarded by the officers of the crown, or abandoned by the grantee. Of the former they pretend to no evidence. Indeed, they say there is none, when they base there inference upon some undefinable fact which may have existed, but nothing of which has ever "been brought to light." But a complete answer to such an inference is the fact that the officers of the crown could not repudiate their grant by an affected disregard of it. Their powers were to make, not unmake, titles. And they could no more repudiate a grant founded upon a *valuable* and *executed consideration* than they could their own deed after receiving and spending the purchase-money. And the grantee, instead of manifesting any act of abandonment, seems, from the whole history of this case, to have pursued it with the most unremitting industry during his lifetime, and his representatives, since his death, have followed it up with equal energy. Under the first act of Congress, in 1804, directing notice and registry of these claims, there is no pretence that it is not noticed and registered. Under the first and second boards of commissioners appointed to adjust these claims it is prosecuted with energy and perseverance. Indeed, such seems to have been the vigilance of these claimants, in enforcing their

rights, that Congress, to protect the actual settlers on the land, have had specifically to close the doors of the courts to this claim by the same act that opened them to all others. Since then they have been repeatedly before Congress, first to rescind the *proviso* restraining the court from giving them a hearing; and now, seeming to abandon all hope of interfering with settlers so long protected, they are here for a confirmation, to be satisfied with an equal quantity of wild land. There is little in all this to indicate any disposition to abandonment.

But your committee are of opinion that every particle of evidence in this case, documentary or otherwise, and every fair and legitimate inference repudiates the idea that this claim was 7
ever abandoned by the grantee, or disregarded by the Spanish authorities; but, on the contrary, that they all tend to establish the fact that it was regarded by the officers as a fair and legitimate claim, founded on a *valuable consideration*, both in money advanced for the crown of Spain and in meritorious and hazardous services performed in exploring the Missouri river and conciliating the Indians along its borders. Besides, it was granted before the treaty of cession was ever dreamed of, either from Spain to France, or from France to the United States, and must have been regarded a valid claim, protected by the treaty of cession, equal in merits to others in Upper Louisiana.

The petition sets forth that they, "the petitioners, believing this claim to be one of a peculiarly meritorious character, but singularly unfortunate, beg leave to submit it at length, and challenge judicial investigation upon its merits. Its size, which constitutes no valid objection before a proper forum, seems to be its only demerit. Had the courts been opened to this, as to other claims, by the several acts of Congress passed for their adjudication, they alone would have been troubled with its investigation. But its rejection by a mere dictum of the first board opened its area to the settlers who entered much of the land, and fearing its singular merits before the courts, resisted every means of having it adjudicated; and with the government it became a matter of public policy to suppress the conflicts at law which its confirmation would lead to, and therefore closed the doors of justice upon it by express provisions of law. To avoid such anticipated conflicts, and to secure for the claim a fair and impartial investigation, they now ask that it may be confirmed; and instead of confirming it

to its proper location, and to secure and quiet the settlers in their titles, that they give them in lieu of it scrip, to be located on any public lands, subject to private entry, and in such quantities as may be deemed proper."

As this claim originated in services rendered and money advanced by the grantee for the crown of Spain, and is alleged to have been given as a remuneration for such services and money, your committee deem it proper to take a short review of the transactions preceding the grant, before they come to apply what they believe to be the established principles of law and equity to it. For the documents see appendix A, before referred to.

Clamorgan's petition to the lieutenant governor and sub-delegate, Don Zenon Trudeau, bears date March 1st, 1797, and very specifically recites the services and sacrifices made by him to the Spanish government: services which consisted in arduous voyages of discovery in the then unknown regions of the west, and in the establishment of military positions and forts, and in raising and equipping of troops, and in the regulation and government of the Indian nations, and the exclusion from those nations of British interlopers from the Northwest and Hudson's Bay Companies, in sacrifices which consisted of great personal hardships and privations and vast pecuniary losses. The petition also recites, that to enable them to prosecute these enterprises, and keep up the military establishments, as authorized by the King of Spain, *a sum of ten thousand dollars per annum* for ten years was appropriated or allowed by the Spanish government of Louisiana; but, in consequence of some official objections started by Intendant General Morales, no part of this sum was ever paid, and the petitioner was thereby subjected to great pecuniary losses. By way of indemnity for these losses, and as a recompense for those services, the grant was prayed for. The concession acknowledges the correctness of the facts stated, and grants the tract as before described; and orders that the surveyor of the province shall, "as soon as his occupation shall permit him," make a survey of the same, conforming to the boundaries described in the petition, in order that the concession and survey shall be presented to the governor general for his approbation."

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That approbation appears to have been subsequently given; for in a letter of Don Zenon Trudeau, lieutenant governor, &c., to Clamorgan, dated July 3d, 1797, he tells him, Clamorgan, that he

had received an official letter from the Baron de Carondelet, governor general, in which he uses the following language in relation to this grant: "*I have received your official letter of the 11th of March last past, in which you state to me the motives that have induced you to grant to Don Santiago Clamorgan the tract of land (here the land is again described as in the petition,) such as you tell me that it has been asked for by the party interested; all which has my approbation, because Clamorgan has deserved this favor of the government.*" "The which," says Trudeau, "I communicate to you for your convenience and government."

Many other letters, official and unofficial, from the Baron de Carondelet to Clamorgan, preceding this, will be found in appendix A, as also one from Intendant General Morales; the whole tendency of which is to confirm and abundantly establish the truth of the statements of services and sacrifices in Clamorgan's petition to Trudeau, and that the assent of Trudeau to the statements was correct. The letter of Intendant General Morales shows that Clamorgan's claims were acknowledged, and not paid when the grant was made, which was to be a final satisfaction of them.

Besides these letters, there are two certificates, signed, &c., before a justice of the peace of St. Louis county, in December, 1818—one by one Charles Sanguinet, and the other by James Mackay, both old inhabitants of St. Louis at the time, and since dead. For these, see appendix B to this report.

These certificates sustain, with singular accuracy, the facts and details set forth in the petition of Clamorgan to Trudeau. Mr. James Mackay, after going over the details of raising troops, spending money, &c., proceeds to state that it was understood that the grant on the Cuiver and Dardenne was made by way of reward for the services of Clamorgan, and to indemnify him for said losses and disbursements.

On comparing this claim with others arising under the Spanish authority, and which have in most instances been confirmed, it will be found to possess peculiar merits in several points: First. This grant is founded on a valid executed consideration. Second. It had the distinct approval of the governor general. And third. The recitals in the petition, showing extraordinary merits, are all proved and sustained in the clearest possible manner, not only by the concession of Lieut. Gov. Trudeau, but by affidavits and let-

ters, cotemporaneous with the transactions, from the highest
9 official dignitaries of the land. In nearly every other case they are gratuitous grants, given with a view to population or agriculture, or both, and entirely prospective as respects any services or utility to the government granting, from the persons receiving the grant. Scarcely any can be found even of the confirmed claims, where a valuable consideration had been paid to the crown of Spain; scarcely one where services so great have been the moving cause to the grant; scarcely one where the specific approbation of the original or inchoate title has been made by the governor general, as in this case. In a large number of cases confirmed by the commissioners, especially in the larger claims, there is no evidence that the grantee even saw the land granted and confirmed to him. In none scarcely is the claim pretended to be founded on passed services or an executed consideration of a pecuniary character. And yet even the Supreme Court held them valid, where they were fortunate enough to get before that tribunal, whose duty is to execute the laws and the treaties, regardless of consequences. And the principles applied by that court for their rule of government in all cases of the kind, sustain this claim with singular force. In 10th Peters, page 330, the court say: "It was never doubted by this court that property of every description in Louisiana was protected by the law of nations, the terms of the treaty, and the acts of Congress; nor that in the term *property*, was comprehended every species of title, inchoate or perfect, embracing those rights which lie in contracts, those which are executory as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed." And again on the next page, in the same case, they lay down the following rule as to the officers empowered to grant. They say: "In all our adjudications on either class of cases, we have considered the term *lawful authorities* to refer to local governors, intendants, or their deputies." In comformity to these rules, and the rule relating to specific grants requiring no survey, this claim, your committee believe, must have been confirmed if ever submitted to that tribunal. That it was not, seems not to have been the fault of the claimants.

Your committee would now invite attention to some of the decisions of that court upon similar claims, and the doctrines and principles laid down as applicable to this case, as illustrative of

what would have been the probable decision of that tribunal in this case if it had been before it, premising that, in point of *merits and consideration*, the cases cited are not superior to the present.

In the Arredondo case the Supreme Court confirmed the claim as obligatory under the treaty of cession of Florida, which only contains a similar protective stipulation in favor of individual rights of private property as the treaty ceding Louisiana. In that case the claim, like the present claim, was large, being for three hundred and forty-two thousand two hundred and fifty arpens. It was a gratuitous grant to Arredondo and his heirs, coupled with a condition of his establishing on the tract two hundred families within the term of three years from the date of the grant, *which condition was never performed*, under the alleged excuse of the cession of Florida to the United States by the treaty of 1819. The only particular in which the Arredondo grant had any advantage of the Clamorgan grant was one of form merely, it having been signed by the intendant general and his secretary, and to that extent consummated. In every other particular, looking to matters of substantial law and equity, this grant your committee believe to be more meritorious. In that case the consideration moving to the grant was prospective, and never performed nor attempted to be performed; in this case the consideration was of both *services and money*, and both had passed before the grant. In that case there was a condition, not performed; in this case there was no condition, as the land had been paid for before the grant. In this case, although the grant was not formally completed, by the actual signature of the governor general to the instrument, it was substantially confirmed by him, as appears by his letter to Lieut. Governor Trudeau approving the grant, and reiterating the obligations of the government which induced it. The reason why the grant was not issued *pro forma* at the date of Baron Carondelet's letter approving it, was doubtless because no survey had been made to ascertain the precise quantity contained within the defined limits; and the survey was only required to be made by the granting officer, "when his, the surveyor general's, occupation would permit." And as the survey under such an order was likely to be delayed, the letter of Carondelet was doubtless written to give Clamorgan the highest assurance that the grant *was approved*, his services and claims on the government recognized, and in due time would be perfected. Your committee entertain no

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doubt that a complete title would have been made at the time of Carondelet's approval, or at any subsequent time during the Spanish dominion there, had the case been prepared for it. That it was not applied for, may be attributed in part to the order of the lieutenant governor allowing the survey to be made at convenience, and partly to the expense of such a proceeding when money was scarce, and when it was dangerous and difficult in that country to make surveys; but more, perhaps, to the belief then general in the province, that such a *title required no additional form to give it validity*—a view now sustained by the court. (See 10th Peters, 331.) Yet upon every principle of equity it was an equally meritorious case as that of Arredondo, which the Supreme Court confirmed.

Another case confirmed by the Supreme Court was that of Perehman, on the river St. John's, in Florida. That was a grant purporting to have been made as a reward for military services. It was an inchoate grant only, not even calling for a specific location, and never was surveyed prior to the treaty of cession. It was made by the lieutenant governor or commandant at St. Augustine, and was not, as in the present case, afterwards specially approved by the superior authority. Again: it so happened in the Perehman case, that the royal order referred to and invoked by the petition, as authorizing the grant prayed for, will be found, and was in fact admitted by the court, not specifically to authorize a grant of such quantity of land or to such a person as the petitioner described himself. Yet, notwithstanding all this, the Supreme Court presumed—a legitimate presumption—that the officer having power to grant, and who undertook to make the grant as a reward for the military services recited, *had legal authority to make it*, and confirmed the claim accordingly. "Power in the offi-
11 cer and fraud in the party constitute the only issues in such a controversy," say the court.

In this, the Clamorgan case, there is no argument against the grant, as in Perehman's case, furnished in the petition itself. The petition, on the contrary, presents an all-powerful claim in services, disbursements, damages, &c., which it recites, and all of which are fully proved by admissions of the highest officers, and by extrinsic evidence of a respectable character. It will further be found that all the rules and principles laid down by the Supreme Court, in their decisions in the above cases, sustain clearly the claim of Clamorgan. It will be found, by reference to the rules and prin-

ciples established by the Supreme Court, that this is necessarily, in their own language, that sort of claim "which would have been confirmed according to the laws, usages, and customs of the Spanish government, and the practice of the Spanish authorities under it at New Orleans, if the government under which the claim originated had continued in Missouri." The following extracts from the opinions of the Supreme Court, in the case of Arredondo, show most conclusively what would be their decision in this case, if it had been allowed to have been submitted to their adjudication: "The laws of Spain and its colonies are the will of the King, expressed by way of royal ordinance or decree of council, *or the act of an authorized officer; it then becomes, as to the persons or matters to which it relates, the law of the kingdom.*" Here, then, in this grant of Clamorgan, is the *act of an authorized officer.* Nothing is more beyond the reach of controversy than the proposition that the lieutenant governor and sub-delegate of Upper Louisiana, and the governor general of Louisiana, were, on the 3d of March, 1797, authorized to grant lands of the royal domain in any quantity, and to whomsoever, and for whatever consideration, consistently with their allegiance, they might think proper.

The Intendant General in Florida certainly had no greater power to grant the King's domain in 1817 than the governor general, Baron de Carondelet, had to grant the lands in question in 1797. If the governor general was authorized to grant, it follows, as a matter of course, that his approbation of the grant by the lieutenant governor must have been equally authorized; and therefore the act of the lieutenant governor was *the act of an authorized officer;* and therefore, according to the above doctrine of the Supreme Court, good and legal, "and, as to the person and the subject-matter to which it relates, the law of the kingdom." Again: the Supreme Court lay it down that "the only questions that can arise between an individual claiming a right under an act done and the public, or any individual denying its validity, *are, power in the officer and fraud in the party.*"

It has been shown, your committee conceive, that the question of *power in the officer* to make such a grant must be decided in favor of the grantee in this case; and as to the question of fraud, it is not only not shown by any proof, a thing to be proved, but the very suspicion is repelled by the whole history of the case. Even the commissioners who decided against the confirmation, bear tes-

timony to the genuine character of the documents. It is a sound legal principle, sustained by the Supreme Court in the following language, that "fraud is not to be presumed, but ought to be
12 proved by the party who alleges it; and if the motive and design of an act was to be traced to an honest source, equally as to a corrupt one, the former ought to be preferred." The fair application of these principles, your committee believe, will effectually protect this claim from all danger of mere gratuitous imputations.

Your committee have adverted to the approval by the governor general, to demonstrate the legality of the grant made by the lieutenant governor to Clamorgan, although they did not deem this absolutely necessary, because, as the court say in the above cited opinions, "*the public acts of a public officer*, purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be by usurpation, but by a legitimate authority previously given or subsequently ratified, which is equivalent." A contrary doctrine to this would be destructive of all private rights in a ceded dominion, and render the article in the treaty protecting them a mere nullity; as it would reduce each claimant to the necessity of maintaining by proof the official character and authority of an officer, where the means of proof were wholly beyond his reach. Then the act of Trudeau, even without the express approval of the governor general, must be taken to have been by a legitimate authority, and the subsequent ratification only confirms it beyond all doubt of controversy. The authority of the granting officer, and the absence of even a suspicion of fraud, being established in this case, it is difficult to conceive what well-founded objection can exist against the claim. It is a grant for a consideration—an absolute sale. There is no condition, express or implied, annexed to the grant, the breach of which could have the effect of defeating it by its non-performance. No specific time was ordered for the survey, the actual occupation, or cultivation of the land. All this was, in terms, left to depend on the will of the grantee, and the convenience of the officer whose duty it was to make the survey. Besides, after the 26th of March, 1804, a survey was prohibited, also occupation and cultivation, even the marking of a tree, under severe penalties, by the act of Congress of that date. It, then, does not become the government to object to the claim for the non-performance of an act, which act it forbid

to be performed. It is equally clear that, on the 3d of April, 1803, the date of the treaty of session, no forfeiture had or could have taken place, by reason of the non-performance of any condition or act. Nor had any taken place on the 10th of March, 1804, the day on which the government of the United States, *de facto et de jure*, commenced in Upper Louisiana. It need not be demonstrated that no forfeiture could have taken place between the 10th of March and the 26th of March, 1804. The regulations of O'Riley, Gayoso, and Morales, if they ever had any effect in Upper Louisiana, which it is alleged they had not, requiring cultivation and occupation of lands gratuitously conceded, never were intended, anywhere, to apply to lands granted *for a valuable consideration paid, or as a reward for services rendered to the crown.* Such grants were passed and executed contracts, which even the King of Spain could not infringe without an *illegal*, despotic, and arbitrary invasion of the rights of his subjects. Land so granted for a passed consideration, without any condition annexed, could no more be forfeited for the want of a survey or cultivation, than could a man's money be taken from him because he did not make the
13 most advantageous use of it. Besides, no survey could be made, or possession and cultivation established, after the 26th of March, 1804.

Your committee have not deemed it necessary to cite or advert to the Spanish laws or ordinances, for the purpose of showing the power of the officer to make such grant, or to demonstrate that such a grant was not only permitted, but enjoined by their laws and ordinances to be made, when such a case as that of Clamorgan should present itself. Your committee believe that the doctrines and principles established in the cases above referred to, render any argument on the Spanish laws, ordinances, usages, or customs, wholly superfluous.

From the first law on the subject, passed in 1542, by the Emperor Charles the Fifth, (which law was incorporated into the Recopilacion of the usages of the Indies in the year 1682,) down to the ordinance of 1798, transferring the power of granting lands from the governor general to the intendant general, is found the powers and duties of the viceroys, presidents, governors general, and sub-delegates, to grant land as a reward for services, and for purposes of settlement and cultivation, imparted and prescribed so repeatedly, and in such precise and emphatic terms, as can leave

no doubt on the subject. And when with these laws and ordinances are combined the uniform customs and usages of the government in her colonies, and particularly in Louisiana, the power of Trudeau and Carondelet to make the grant in question assumes the character of a mathematical truth.

Your committee have thus endeavored fairly to lay open this whole claim, in all its bearings, and in such a manner as to make it easily understood, and invoke for it such a consideration as its merits demand. They have shown it was a grant based on a *valuable consideration*—that it was made and approved by *competent authority*—that it was certainly good under the laws, customs, and usages of Spain, and as such was protected by the treaty of cession—that, being for an executed consideration, no forfeiture could have worked under the Spanish dominion on account of neglect or delay in the grantee; and none under the United States, as one of its first acts was to prohibit all action on the part of the claimant—that there never was the slightest imputation of fraud upon the grant; and that it was brought, in every particular, within the principles uniformly laid down by the Supreme Court in similar cases; and that it is no fault of the grantee, that that tribunal has not been invoked upon its merits.

The petitioners very properly say, in their petition, that, "in presenting a claim to the consideration of Congress of this magnitude, they feel that they have no right, nor do they desire, to ask anything on the grounds of favor; but that they, in common with every citizen, have a right to invoke the judgment of your honorable bodies upon their legal and equitable claims, and in the name of justice demand that they receive a fair and impartial hearing, and a decision upon their rights under the law."

And, in their prayer, they further state that, "by a mere *dictum* of the first board of commissioners, this claim was thrown back, until the lands embraced within its limits were chiefly occupied with settlers—when the government was induced from mere policy to protect the occupants, and close a door to endless lit-
14 igation, to preclude it from the courts, which had been opened generally and liberally to claimants. But those reasons for smothering it under considerations of policy no longer exist, as the petitioners are willing to abandon their true location, secure the occupants in their titles, and only ask for a confirmation to be located on other wild lands, subject to entry, in such quantities as you (the Congress) may deem just."

Which prayer of the petitioners, your committee, upon a full and fair examination of the case, and for the reasons already submitted in this report, are of opinion ought to be in justice granted; and, in conformity to this opinion, herewith report a bill, and ask that the same may be passed.

A.

Jacques Clamorgan, claiming 500,000 arpens, to Don Zenon Trudeau, governor of Upper Louisiana.

Nothing has made the petitioner so proud as the encouragement and emulation you have given to his industry, for the purpose of accomplishing the discovery of the Indian nations extending themselves to the Pacific ocean. The petitioner being charged with that mission by the general government, you condescended to give him hopes that he would have the honor of your protection and support. You did more: you solicited from the general government the aid claimed by the petitioner, in order to proceed with vigor in an enterprise of which his Majesty himself appeared to be occupied. In fact, his Majesty granted to the petitioner an exclusive privilege for trading ten whole years with the nations of Upper Missouri, not only in order to open a new branch of commerce in furs, but also to get information about, and topographical knowledge of, the immense territory which was to be explored. Those objects could not be attained but by making great sacrifices among the Indian nations, in order to conciliate to us their esteem and friendship. In consequence of your recommendations, sir, his excellency the Baron de Carondelet laid before his Majesty an account of the excessive expenses to which the petitioner had been subjected in this arduous enterprise of facilitating communications then so extensive.

His Majesty, in his goodness, determined, in favor of the petitioner, that a sum of ten thousand dollars should be paid annually to him, in order to contribute to the expenses occasioned by the discovery of the nations and territories of Upper Missouri, as also in keeping away foreigners, who, from Hudson's Bay and Lake Superior, transported their goods, in order to bribe the credulous nations inhabiting the said Upper Missouri.

His excellency the Baron de Carondelet, as well as you, sir,

communicated immediately, by official letters to the petitioner, the generosity of his Majesty in his favor; but it had not its intended effect, on account of the impediments thrown in the way by the Intendant Morales, who pretended at the time to have in the King's coffers no funds appropriated to that object! In consequence of that state of contradiction between the two powers, the petitioner has remained a victim of his zeal and activity in rendering himself useful, in compliance to the wishes of the general government, and to the intentions of his Majesty. In these unfortunate circumstances the petitioner presumes to claim of your goodness that you will be pleased to grant to him, on the western side of the river Mississippi, some leagues above the mouth of the Missouri, the tract of land bounded on one side by the little river called Lacharette, *alias* Dardenne, and on the other by the little river called Au Cuivre: one on the south, the other on the north, will serve as boundaries to those two sides. The petitioner wishes, moreover, that you would be pleased to grant to him sixty arpens of land in front, on the banks of the Mississippi, immediately adjoining the mouth of the first above-named river Lacharette, in descending the current of the Mississippi; and again, sixty arpens in front, also on the banks of the Mississippi, adjoining immediately to the upper side of the mouth of the second above-named river, Au Cuivre, and ascending the current of the Mississippi. The depth of the three different above-described tracts of land to be extended by two lines, starting from the banks of the Mississippi, one from the southern and the other from the most northern point (of the front) of the above-demanded tracts; which two lines shall be run parallel on each side, in a westerly direction, until they reach the top of the high hills in the rear; and from there, the said two lines to be continued and prolonged in the same westerly direction, until they reach a point at the distance of about two hundred arpens from the foot of said hills; and then those two extreme points shall be connected together by a straight line, which shall be run so as to form the fourth side of the said three tracts here above demanded. The said lines encompassing in their extent all the waters of the above-mentioned rivers, Lacharette, *alias* Dardenne, and Au Cuivre, in order that, hereafter, the petitioner may erect saw and grist mills thereon, also place there a number of cattle, have slaughter-houses, and send salt meat to the capital. And the petitioner shall render thanks to your goodness.

J. CLAMORGAN.

Don ZENON TRUDEAU, *Capt. in the regiment of Louisiana, Lt. Col. by brevet, and Lt. Governor Western part of Illinois.*
ST. LOUIS, *March* 1, 1797.

ST. LOUIS, *March* 3, 1797.

Cognizance being taken of the statement made by Don Santiago Clamorgan, and the governor general, the Baron de Carondelet, having particularly recommended to me to facilitate and protect the discovery and commerce of Upper Missouri, in which the above-named Clamorgan has engaged at my entreaties; considering the losses which said enterprise has occasioned to him, and the new expenses to which he shall have to contribute on account of the same undertaking, and how important it is to favor and extend the discoveries herebefore mentioned, without prejudice to the royal treasury, and to the interest and welfare of these settlements; but,
16 on the contrary, in contributing to their prosperity by drawing new inhabitants; for these considerations, and on account of the said Clamorgan having rendered himself worthy and deserving of the favors of the government, the surveyor of this jurisdiction (as soon as the occupations of his place will permit) shall survey, in favor of the party interested, the extent of land he solicits, in the way and manner described in the foregoing document, which, together with the plat and certificate of survey, and of the boundaries which shall be set (to said land) will form the title of concession which, in due time, he shall have to lay before the general government of the province, in order to get its approbation and record.

ZENON TRUDEAU.

ST. LOUIS, *August* 16, 1834.

Truly translated from record-book D, pages 314 and 315.

JULIUS D. MUNN, *T. B. C.*

No. 1.

NEW ORLEANS, *May* 26, 1794.

I have read, sir, with much interest, the memorial you have addressed to me. It contains political views which do honor to your understanding, and are in accordance with the ideas I have laid

before the court two years ago. We are, perhaps, very near the moment when we shall see them realized; but time and pains are needed to convince the ministers of their utility. The grand objects which, for the present, absorb all the attention of the different powers, will perhaps delay for some months the approbation of this plan; but I do not despair of seeing it adopted before the end of the year.

Some errors have crept in among your details, which the enthusiasm for what is good and too full conviction of your own ideas have hidden from you; but in the main they are just, and the means of execution well combined.

I have the honor to be, with the most perfect consideration, sir, your very humble and very obedient servant,

LE BARON DE CARONDELET.

MONS. CLAMORGAN.

No. 2.

NEW ORLEANS, *July* 22, 1794.

SIR: I have indeed received the political memorial you directed to me, under the double cover which you mention. The letter annexed to it, for Mr. Delassus, was also received at the same time, and suspecting same mistake, and also conjecturing what might be the contents of it, I threw it into the fire.

17 I have already had the honor to tell you my sentiments on one part of the contents of your memorial, which I have read with the greatest interest. Let us wait till the storm which agitates the political atmosphere be somewhat dissipated, and then we shall see what the future situation of Europe will permit us to do for the welfare of Louisiana, which I hope will advance more in the last five years of this century than it has done ever since the beginning of it, up to the period of my coming into the province.

Your views, sir, are in perfect accordance with mine. True wealth is to be found only in agriculture, and this requires a competent population and easy outlets. Louisiana is susceptible of all these advantages; but present circumstances are not favorable to our views. Let us, then, have patience for awhile, and by remaining attentive spectators of passing events, we may seize on the first opportunity of success.

I have the honor to be with the most perfect consideration, sir, your very humble and very obedient servant,

LE BARON DE CARONDELET.

MONS. DE CLAMORGAN.

No. 3.

NEW ORLEANS, *May* 11, 1796.

SIR: In consequence of what you wrote to me in your letter of 10th April, I send to Mr. Trudeau some medals for the company, and among them a very fine gilt one, which I intend for the great Maha chief, in order to flatter him most. I also send several commissions, leaving a blank for the names, so that Mr. Trudeau may have them filled up; but it is to be wished, as much for the company as for the King, that there should be but one single chief decorated with a great medal, one with a small one, and two captains in each nation, for, hereafter, those chiefs will require compensations adequate to their grades. I send also five flags by Mr. Chouteau, and when, in execution of the treaty concluded with the United States, we shall abandon the Bluffs, the commandant will send to Mr. Trudeau ten swivels for the service of the company's forts.

Mr. Chouteau is also bearer of a commission, such as you desired for Mr. Mackay. Finally, I send to Mr. Trudeau the order that Mr. Todd may take an interest in the company of discoveries.

There is no objection to Mr. Todd having the exclusive trade of the Sac and Fox nations in the country east of the Missouri, and even on the said Missouri, during the term of his contract; but it would not be proper to have it extended to the western side before we positively know, and are perfectly acquainted with, the force and situation of the nations situated on the (last) above-mentioned side of said river. Besides, I must avoid to have those nations at variance with the Osages, whom Messrs. Chouteau are beginning to keep in subjection, and who will be an impediment to the aggrandizement of our settlements as long as we cannot keep them in peace.

18 I am concerned to see that our settlers of Upper Mississippi who might acquire true wealth by agriculture, prefer to devote themselves to the fur trade, which is as dangerous as it is precarious. The working of the lead mines would also afford great profits, because we might furnish the Havana with this article, and yet we are constantly destitute of it for want of labor; at this moment there is none, either in the King's or in private warehouses.

I have the honor to be, with the most perfect consideration, sir, your very humble and very obodient servant,

LE BARON DE CARONDELET.

Mons. DE CLAMORGAN.

No. 4.

NEW ORLEANS, *July* 9, 1796.

SIR: I have received the account of Mr. Mackay's travel to the Maha nation; as also his instructions given to the party going to the discovery of the South Sea. I would be so much the more flattered should this last (expedition) succeed, as it is confidently reported that a Spanish squadron has sailed from Europe in order to go and dislodge the English from Nootka Sound; and it would be a curious fact if our people were to reach the same point at the same time.

I thought I had written to you that the establishment of a fort at the river St. Peter had already been proposed to the court, which is occupying itself of the means required to put Louisiana in a respectable state of defence; but time is needed, for everything remains to be done, and the political circumstances of Europe attract all the attention.

I have the honor to be, with the most perfect consideration, sir, your very humble and very obedient servant,

LE BARON DE CARONDELET.

Mons. DE CLAMORGAN.

ST. LOUIS, *August* 26, 1834.

The above four letters are truly translated from the original.

JULIUS DE MUN, *T. B. C.*

No. 5.

NEW ORLEANS, *September* 18, 1796.

SIR: I have just received the agreeable news of the approval of the "Spanish company formed in 1794, (these are the proper words of the royal decree made in the Council of State held on the 27th of last May,") for the purpose of making discoveries to the westward of the Missouri, as also of the regulations and instructions under which your lordship has sanctioned and granted to the said company the exclusive privilege of the fur trade, with

all the nations of Indians on said Missouri, who inhabit be-
19 yond the nation of Poncas, offering three thousand dollars as a reward to the first who will reach the South Sea.

2nd. The permission granted to the said company to arm and maintain armed, in the forts which it has or may have hereafter, at the expense of his Majesty, the one hundred men who are thought to be necessary, the whole being under your lordship's orders, for the end designated, which you will watch with the greatest care, &c.

I hope, sir, that, in consequence of these favors and privileges, the company will derive new vigor, and will make the greatest efforts in order to correspond to the intentions of his Majesty, and exclude the English from those parts.

The house of Todd is also approved of by the King, who has added to all these favors that of the reduction of the duties from fifteen to six per cent. for all the colony.

We will see if Leglise gets the prize of $3,000.

I have the honor to be, with the most perfect consideration, sir, your very humble and obedient servant,

LE BARON DE CARONDELET.

Mons. CLAMORGAN.

The above letter, No. 5, is truly translated from record-book D, page 316.

JULIUS DE MUN, *T. B. C.*

No. 6.

NEW ORLEANS, *October* 26, 1796.

In a royal order, under date of 11th of June of this year, the most excellent Señor Don Diego de Gardoqui, Secretary of State, and of the Universal Despacho, &c., among other things, tells me the following:

"In the council of state held on the 27th of last month, extracts of your lordship's last letters, up to the 10th of February, were laid before the King, together with the topographical plat of the rivers Mississippi and Missouri, on which are demonstrated the progresses of the Spanish company of discoveries to the westward of this last river, established on the 12th of May, 1794, as also the encroachments of the English companies upon the Spanish pos-

sessions. His Majesty being well informed of all the occurrences in that province, and of the means which your lordship has proposed, with the advice of the intendant and of the English merchant, Don Andrew Todd, of Michilimackinac, his Majesty has condescended to grant, with the unanimous accordance of the said council, the following points and favors:

"1st. The approval of the Spanish company formed in 1794, for the purpose of making discoveries to the westward of the river Missouri, under the instructions and regulations with which your lordship has permitted and granted to said company the exclusive privilege of the trade with all the nations of Indians on the said Missouri, who inhabit beyond the nation of Poncas, offering a reward of $3,000 to the first who reaches the South Sea.

"2d. The permission that the company may arm at its own expense, and maintain armed, in the forts which said company has or may have hereafter, the one hundred men who are considered necessary; the whole to be under your lordship's orders, for the purpose indicated, the accomplishment of which your lordship shall have to watch with the greatest care.

"3d. That all the duties on imports and exports shall be reduced, for the present, to six per cent., as your lordship and the intendant have proposed, both taking care, with the greatest exactness possible, to observe and lay before his Majesty, at the end of the first year, the results which are expected from so munificent a disposition.

"Finally, that your lordship give to understand, to all, the magnitude of these concessions, and the immense benefits which the sovereign munificence has condescended to accumulate in the treaty of amity, limits and navigation—benefits which are of reciprocal utility to his beloved subjects, to the United States, and to the Indian nations allied and friendly to the two contracting parties; and that your lordship shall so order, that all the important objects which are expected from these dispositions shall be duly executed. All which I do communicate to your lordship, by order of his Majesty, for your intelligence and for their execution."

I forward the same to you for your satisfaction and government.

May God have you in his keeping many years.

LE BARON DE CARONDELET.

Señor DON SANTIAGO CLAMORGAN.

No. 7.

NEW ORLEANS, *November* 5, 1796.

Upon date of the 3d instant, the intendant of these provinces writes to me what follows: "The meaning which I give to the article in the royal order of the 11th June of this year, upon which Don Santiago Clamorgan, director of the Spanish company of discoveries to the westward of the Missouri, has founded the demand which your lordship has been pleased to enclose in your official note of 31st ultimo, is, that the cost of arming, and the maintenance of the one hundred men, whom the company wants for the forts it has or may have hereafter, must be on its own account; and in this opinion, besides the literal interpretation of said article, to-wit, *the permission that the company may arm at its own expense, and maintain armed, &c.*, I am moreover confirmed, 1st, by the circumstance of the permission of arming having ever been granted, for it appears to me that, had it been intended to be on the King's account, it would only have been necessary to notify that the one hundred men were to be furnished to the company; 2d, by said royal order not mentioning any sum, as it would have been indispensable in order to enable the royal treasury to make the disbursement; and, finally, by his Majesty not having appropriated funds for this no small expenditure, which cannot be supported by his royal coffers in this province, particularly
21 in their present state of scarcity and embarrassment, without being deprived of the means necessary to maintain the troops, the civil officers, the squadron of galleys, the works of Pensacola, and other extraordinary contingencies which occur every day. In consequence of all this, I find myself under the obligation to oppose the delivery of the said sum of ten thousand dollars, and to beg of your lordship, that, in case my reasons should not appear well founded, to consult his majesty on this matter, and in order that, by his royal declaration, I shall be sheltered from the responsibility which would result to me, were I to accede to the demand of Mr. Clamorgan on the terms he has established it."

I transmit the same to you for your knowledge and government.

May God have you in his keeping many years.

LE BARON DE CARONDELET.

Señor Don SANTIAGO CLAMORGAN.

The above two letters, Nos. 6 and 7, are truly translated from the originals.

JULIUS DE MUN, *T. B. C.*

No. 8.

NEW ORLEANS, *November* 8, 1796.

I see no objection to your levying in the country of Illinois the one hundred militiamen whom his Majesty has granted for the forts of the Missouri company, but I cannot answer for the reimbursement of the ten thousand dollars, because it depends on his Majesty's decision; although I am confident that when he sees my representation he will order it to be made, since I have solicited and supported the same.

It is all I have at present to answer to your official letter on this subject.

May God our Lord have you in his keeping many years.

LE BARON DE CARONDELET.

Señor Don SANTIAGO CLAMORGAN.

No. 9.

NEW ORLEANS, *May* 24, 1797.

SIR: I have received the letter you directed to me under date of the 15th of last April. Your claim is accompanied by the best reasons possible, and would not suffer any difficulties, were it not for the obligation I am under to take all the sureties necessary to the responsibility of my place, in order to justify, in the clearest manner, the extraordinary use made of the funds confided to me by his Majesty. Therefore, I have written on this subject to Mr. Dehault Delassus, and according to the explicit answer which I expect of him, I will order what shall appear to me most advisable.

I have the honor to be, sir, your very humble and very obedient servant,

JUAN VENTURA MORALES.

Mr. CLAMORGAN.

22 No. 10.

ST. LOUIS, *July* 3, 1797.

Under date of April 5th of this current year, the Governor General, Baron de Carondelet, writes to me as follows:

"I have read your official note dated 11th of last March, in which you state the motives which have induced you to grant to Mr. Clamorgan the tract of land situated between the two rivers Charette and Cuivre, both emptying into the Mississippi; also, sixty arpens to the north and sixty arpens to the south of said rivers, which serve to determine the situation of said land, having the Mississippi in front. Two parallel lines are to be drawn, running in the interior of the country, until they reach at the distance of two hundred arpens beyond the foot of the first hills, conformably to the solicitation of the party interested. All which I do approve, Clamorgan having deserved this favor from the government."

I transmit the same to you for your knowledge and government.

May God have you in his keeping many years.

ZENON TRUDEAU.

Señor Don SANTIAGO CLAMORGAN.

ST. LOUIS, *August* 28, 1834.

The three last letters, Nos. 8, 9, and 10, are truly translated from record-book D, pages 315 and 316.

JULIUS DE MUN, *T. B. C.*

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The above is a true copy from Executive Document No. 16, 1st session 24th Congress, being copies printed by Congress of documents on file in the Clamorgan claim at St. Louis, from pages 401 to 409, inclusive.

B.

No.	Name of original claimant.	Arpens.	Nature and date of claim.	By whom granted.	By whom surveyed, date and situation.
152	James Clamorgan.	Not ascertained.	Concession, 3d March, 1797.	Zenon Trudeau.	On Cuivre and Dardenne, on the Mississippi.

Evidence with reference to Minutes and Records.

November 14, 1811. Board met—present John B. C. Lucas, Clement B. Prenrose, and Frederick Bates, commissioners.

Jacques Clamorgan, claiming 500,000 arpens of land, situate on rivers Mississippi, Dardenne, and Cuivre, district of St. Charles, produces a concession from Zenon Trudeau, L. G., dated 3d
23 March, 1797; also four letters to claimant, from Zenon Trudeau, Juan Ventura Morales, and Baron de Carondelet.

It is the opinion of the board that this claim ought not to be confirmed.

Jacques Clamorgan, claiming 60 arpens front on Mississippi, Charette and Dardenne, back to the hills, about two hundred arpens, district of St. Charles, produces same concession and papers as in the preceding claim.

It is the opinion of the board that this claim ought not to be confirmed.

Jacques Clamorgan, claiming 60 arpens of land, front on the Mississippi, commencing above the mouth of the Cuivre, up the Mississippi, and back to the hills, produces same concession and papers as in the foregoing claim.

It is the opinion of the board that this claim ought not to be confirmed. (See Minutes, No. 5, page 417.)

June 21, 1833. The board met pursuant to adjournment—present A. G. Harrison and F. R. Conway, commissioners.

James Clamorgan, by his legal representatives, claiming a tract of land on the Cuivre and Dardenne, quantity not ascertained—see record book D, page 314; Minutes, No. 5, page 417; Spanish record of Concession No. 3, page 21, No. 13—produces in evidence six letters, purporting to be original letters from Baron de Carondelet to James Clamorgan; also a certificate of James Mackay and one of Charles Sanguinette, both sworn to before a magistrate; also a paper purporting to be a translation from Spanish into French of a letter from Baron de Carondelet to Clamorgan, translated by M. P. Leduc, and certified by him to have been so translated from the original letter, in the proper handwriting of the said Carondelet; also a paper purporting to be a receipt from Risdon H. Price for two original letters from Baron de Carondelet to James Clamorgan.

M. P. Leduc, duly sworn, says that the signatures to the six above letters are in the proper hand-writing of Baron de Caron-

delet, and that the translation here above produced is a faithful translation made by him from the original letter, written in Spanish, in the proper handwriting of said Baron de Carondelet.

L. E. Lawless, agent of claimants, being duly sworn, says that the two original letters described in the receipt were delivered by him to said R. H. Price on the day of the date of said receipt, signed by said Price. To the best of deponent's belief, the concession, as recorded, was at same date in the possession of said Price, and that said Price is at present out of this State. Deponent further thinks that said documents have remained in possession of said Price, and are now out of the reach of said claimants. Deponent further states, that said Price obtained said documents for the purpose of laying the same before Congress, in order to obtain the confirmation of said claim. (See Minutes, book No. 6, page 179.)

June 29, 1833. The board met pursuant to adjournment—present Louis F. Linn and F. R. Conway, commissioners.

In the case of James Clamorgan, claiming lands on the Cuivre and Dardenné, (see page 179, No. 6,) the following testimony was taken:

24 Paschal Cerre, being duly sworn, deposes and says, that he was well acquainted with Charles Sanguinette, senior, who died some 12 or 15 years ago; that he was a man of probity, and in every way to be relied on; likewise he was a man of considerable property. The deponent further states, that he was acquainted with James Mackay, and that he was a man of respectability and property; that about forty years since, Mackay made a voyage of discovery and trading up the Missouri river; deponent knows the outfit was made at Clamorgan's house, and believes that Mackay was concerned and interested with Clamorgan in the enterprise.

Jessie Richardson, being duly sworn, says that he is fifty-seven years of age; that he has lived in the now State of Missouri, and in that vicinity, since 1799. This deponent says he knew James Clamorgan, deceased, and always understood, among the old inhabitants of the country, that the said Clamorgan had been in the employment of the Spanish government, and that the Spanish government was largely indebted to said Clamorgan, and that by way of remunerating said Clamorgan for his services, and compensating him for what the government owed him, large grants of

land were made to said Clamorgan, particularly a large tract lying on the Mississippi, and on the rivers Dardenne and Cuivre. This tract was looked upon by the old inhabitants under the Spanish government as said Clamorgan's property. Deponent says that he knew James Mackay; he was a man of probity, and of high standing under the Spanish government. Charles Sanguinette, deceased, was a man of good reputation, and this affiant believes that the statements of said Mackay and Sanguinette are entitled to full credit—any statements they made in relation to this claim or any other subjects.

Question by commissioners. Do you know the quantity and boundary of said tract?

Answer. I do not know the boundaries of said tract; I understood it was very large, embracing a great portion of the lands lying in the forks of the Missouri and Mississippi. This affiant has always heard the people expressing their fears that this claim would be confirmed and deprive those settled on it of their possessions. This affiant understood the land was about 500,000 arpens; that it lies on the Mississippi, extending from above the mouth of Cuivre to below the mouth of Dardenne, and back for quantity.

Question by commissioners. Did you ever hear this claim spoken of as fraudulent?

Answer. Never; but, on the contrary, I always understood that it was made to Clamorgan to pay him what the Spanish government owed him, as a reward for his services. I never heard any person who was interested against this claim pretend that it was fraudulent, or any person whatever.

Question by commissioners. Have you any interest in this claim?

Answer. No; I have feared that it would interfere with a claim I have, not confirmed; but, upon inquiry, I believe there is no danger. (See Minutes, No. 6, page 205.)

July 16, 1833. The board met pursuant to adjournment—present L. F. Linn and F. R. Conway, commissioners.

In the case of James Clamorgan, claiming land on Cuivre and Dardenne. (See page 179 of this book, No. 6.)

Jean Elie Tholozan, being duly sworn, says that he believes 25
it was about the year 1816 that he gave to Risdon H. Price the concession and all the papers he had in his possession relating

to this claim, in order to have said claim presented to Congress for confirmation; that he has heard that said Price is now out of this State, and does not know where these papers are, and neither to whom to apply for them. (See No. 6, page 234.)

September 26, 1835. The board met pursuant to adjournment—present, F. R. Conway, J. H. Relfe, and F. H. Martin, commissioners.

In the case of James Clamorgan, claiming land on Dardenne and Cuivre. (See book No. 6, pages 179 and 234.)

The board are unanimously of opinion that this claim ought not to be confirmed, believing it to have been disregarded by both Trudeau, the lieutenant governor, who made the grant, and by his successor, Delassus. For a full opinion and notice of interferences, see report of the board to Commissioner of the General Land Office. (See book No. 7, page 249.)

JAMES H. RELFE.
F. R. CONWAY.
F. H. MARTIN.

The above are the minutes of the several boards of commissioners upon the Clamorgan claim, copied from Executive Document, No. 16, 1st session 24th Congress, from pages 419 to 421, inclusive, as reported and published by Congress.

IN THE SUPREME COURT

OF THE

UNITED STATES.

THE UNITED STATES,
Appellants,
vs.
HENRY CLAMORGAN *et al.*

HENRY CLAMORGAN *et al.*,
Appellants,
vs.
THE UNITED STATES.

CYPRIAN CLAMORGAN,
Appellant,
vs.
THE UNITED STATES.

Appeals from the District Court of the United States for the Eastern District of Missouri.

Consolidated.

PHILADELPHIA BAR ASSOCIATION

BRIEF AND ARGUMENT FOR THE APPELLANT CYPRIAN CLAMORGAN.

WILLIAM R. WALKER,
Counsel for Cyprian Clamorgan.

St. Louis: Press of G. I. Jones & Co.

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vs.
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Consolidated.

BRIEF AND ARGUMENT FOR THE APPELLANT CYPRIAN CLAMORGAN.

STATEMENT OF THE CASE.

The magnitude of the interests involved in this case, and the complex questions raised, both of law and fact, render

it necessary that a full presentation of the case should be made. Counsel will therefore trace the history of the claim of the Clamorgan heirs from its inception, endeavoring at the same time to do so with as much brevity as the circumstances of the case will permit.

This case arises on a petition filed July 28, 1873, by Henry Clamorgan, Cyprian Clamorgan, Leon A. Clamorgan, and Julius Clamorgan, heirs of Jacques Clamorgan, in the District Court of the United States for the Eastern District of Missouri, under the provisions of the act of Congress entitled "An act for the final adjustment of private land-claims in the States of Florida, Louisiana, and Missouri, and for other purposes," approved June 22, 1860 (12 Stats. at Large, 85), and the acts of March 2, 1867 (14 Stats. at Large, 544), and June 10, 1872 (17 Stats. at Large, 378), by which two last-mentioned acts the act first above referred to was revived and continued in force. The said act of June 10, 1872, revived the original act for three years, and within that period the present suit was brought.

The claim sought to be enforced in this case against the United States is for three tracts of land, fronting on the Mississippi River, under a concession or grant by Zenon Trudeau, lieutenant-governor, under Spain, of Upper Louisiana, to Don Santiago Clamorgan, otherwise known as Jacques Clamorgan. This concession is dated St. Louis, March 3, 1797, and was confirmed and ratified, of date April 5, 1797, by the governor-general, the Baron de Carondelet. The land embraced in this grant was within the then boundaries of the province of Upper Louisiana, and within the counties of St. Charles and Lincoln, as now constituted, in the State of Missouri, and within the Eastern District thereof.

It would be tedious, and it is, moreover, unnecessary, to enter into the details of the provisions of the various treaties by which France, Great Britain, Spain, and the United States successively occupied the territories embraced in what was known as the ancient province of Louisiana.

These are historic facts that have been frequently before this court. It will be sufficient, for the purposes of this case, to do little more in this respect than briefly recite the dates and general substance of the several treaties. By the secret treaty of Fontainbleau, of November 3, 1762, followed by the definitive treaty of Paris, of February 10, 1763, the then province of Louisiana was partitioned between Great Britain and Spain. The Canadas were ceded to Great Britain, and also all that portion of ancient Louisiana situated to the eastward of the Mississippi, except the city of New Orleans and the island embracing it, while Spain acquired the remainder of the province, including the city and island of New Orleans. Spain thereby became the sovereign of all that territory embracing what now constitutes the States of Missouri, Iowa, Kansas, Arkansas, Nebraska, the greater portion of Louisiana, besides other large tracts stretching towards the Pacific,— tracts then unexplored and unknown to civilization. Possession was taken by Spain at New Orleans, formally, in 1764, although actual possession was not had till 1769.

Subsequently, by the treaty of San Ildefonso, of October 1, 1800, Spain retroceded to France the territory she had acquired by the treaties of 1762 and 1763. By the treaty of Paris, of April 30, 1803 (8 Stats. at Large, 200), France ceded the same territory to the United States. Art. 2 of that treaty provides as follows: —

"In the cession made by the preceding article are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices, which are not private property." * * *

Art. 3 of the treaty is as follows: —

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and, in the

meantime, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

The territory thus acquired by the United States was, by act of Congress of March 26, 1804, divided into two districts, called respectively Orleans and Louisiana, the latter including the present State of Missouri.

It will thus be seen that in 1797, when the grant or concession on which the present claimants base their claim, was made, Spain was the sovereign, and in actual possession of a province embracing the present State of Missouri. This vast province, chiefly inhabited by Indians, unknown for the most part to civilization, unexplored and untrodden by the foot of a white man, attracted the attention of the Spanish authorities, on their gaining possession of it, in 1769, and they saw in it a great field for exploration and for the extension of the sources of the national wealth. St. Louis, founded in 1764, was then but a trading-post, with only a few inhabitants. At this juncture, for the first time, Jacques Clamorgan appears on the page of history. Where he came from and what were his antecedents are entirely unknown. But he appears on the scene as a man, energetic, resolute, and brave, who went heart and soul into the schemes of the Spanish authorities for the exploration of the territory and for the opening up of new avenues of wealth. He appears as a man high in the confidence of the authorities, and on terms of intimacy with the governor-general, Baron de Carondelet. In 1794, a Spanish company was formed for the purpose of making discoveries to the westward of the Missouri, with exclusive control of the trade with all the nations of Indians who inhabited the country south of the Poncas. (American State Papers, Green's ed., vol. 3, p. 269). Clamorgan was put at the head of this company, which was called the "Missouri Fur Company," and which appears to have been organized under the auspices of the Baron de Carondelet, and approved by the king. (See the letters of the Baron

to Clamorgan, of September 18, 1796, p. 135, printed record.) It will be seen by this letter that permission was granted to the company to arm, and maintain armed, in the forts then or to be thereafter erected, one hundred men, the whole being under the orders of Clamorgan, who received a promise of $10,000 annually from the king. (See letter of Carondelet to Clamorgan, November 5, 1796, p. 136, printed record.) This and the other letters from Carondelet and the Intendant Morales to Clamorgan (pp. 132–138, of the printed record) show that Clamorgan's services to the government were appreciated. The company in question, which was called the "Missouri Fur Company," appears to have collapsed for want of funds. His majesty's coffers seem to have been at a low ebb, and the promised annuity of $10,000 was therefore not forthcoming, and the privileges conferred on the company were abandoned. On the dissolution of the company, Clamorgan was authorized to obtain, as his share of the company's assets, whatever remuneration his majesty might grant for the services performed and expenditures made on behalf of the king. (See affidavit of James Mackey, March 7, 1817, p. 142, printed record.) It will be seen from that affidavit that considerable sums were expended by the company for presents of "merchandise necessary to secure the friendship of the Indians to our establishments, and to estrange them from the influence and trafficking with the British Northwest and Hudson Bay Companies," and also that militiamen were actually raised and distributed among the several forts or establishments of the company, "*under a full expectation of receiving the promised compensation of ten thousand dollars therefor yearly.*"

Clamorgan being thus, as he himself puts it, "a victim of his zeal and activity," and seeing that his services could not be paid in money, resolved to apply, as was common in those days, to the authorities — who, as history shows, were prodigal in granting lands for services rendered — for a grant of land in remuneration of his services. Ac-

cordingly, on the 1st of March, 1797, he preferred to the lieutenant-governor of Upper Louisiana, Don Zenon Trudeau, his "requette," or petition, of which (pp. 126, 127, printed record) the following is a translation: —

"*To Don Zenon Trudeau, Lieutenant-Governor of Upper Louisiana:* —

"Nothing has made the petitioner so proud as the encouragement and emulation you have given to his industry for the purpose of accomplishing the discovery of the Indian nations extending themselves to the Pacific Ocean. The petitioner being charged with that mission by the general government, you condescended to give him hopes that he would have the honor of your protection and support. You did more: you solicited from the general government the aid claimed by the petitioner, in order to proceed with vigor in an enterprise of which his majesty himself appeared to be occupied. In fact, his majesty granted to the petitioner an exclusive privilege for trading ten whole years with the nations of Upper Missouri, not only in order to open a new branch of commerce in furs, but also to get information about, and topographical knowledge of, the immense territory which was to be explored. Those objects could not be obtained but by making great sacrifices among the Indian nations, in order to conciliate to us their esteem and friendship. In consequence of your recommendations, sir, his excellency, the Baron de Carondelet, laid before his majesty an account of the excessive expenses to which the petitioner had been subjected in this arduous enterprise of facilitating communications then so extensive. His majesty, in his goodness, determined in favor of the petitioner, that a sum of ten thousand dollars should be paid annually to him, in order to contribute to the expenses occasioned by the discovery of the nations and territories of Upper Missouri, as also in keeping away foreigners, who, from Hudson's Bay and Lake Superior, transported

their goods in order to bribe the credulous nations inhabiting the said Upper Missouri. His excellency, the said Baron de Carondelet, as well as you, sir, communicated immediately, by official letters, to the petitioner the generosity of his majesty in his favor; but it had not its intended effect, on account of the impediments thrown in the way by the Intendant Morales, who pretended at the time to have in the king's coffers no funds appropriated to that object. In consequence of that state of contradiction between the two powers, the petitioner has remained a victim of his zeal and activity in rendering himself useful, in compliance to the wishes of the general government and to the intentions of his majesty. In these unfortunate circumstances, the petitioner presumes to claim of your goodness that you will be pleased to grant to him, on the western side of the river Mississippi, some leagues above the mouth of the Missouri, the tract of land bounded on one side by the little river called La Charette, *alias* Dardenne, and on the other by the little river called Au Cuivre; one on the south, the other on the north, will serve as boundaries to those two sides.

"The petitioner wishes, moreover, that you would be pleased to grant to him sixty arpents of land in front on the banks of the Mississippi, immediately adjoining the mouth of the first above named river, La Charette, in descending the current of the Mississippi; and again, sixty arpents in front, also on the banks of the Mississippi, adjoining immediately to the upper side of the mouth of the second above named river, Au Cuivre, and ascending the current of the Mississippi. The depth of the three different above-described tracts of land to be extended by two lines, starting from the banks of the Mississippi, — one from the most northern point (of the front) of the above demanded tracts, — which two lines shall run parallel on each side, in a westwardly direction, until they reach the top of the high hills in the rear; and from there the said two lines to be continued and prolonged in the same westwardly direction

until they reach a point at the distance of about two hundred arpents from the foot of said hills; and then those two extreme points shall be connected together by a straight line, which shall be run so as to form the fourth side of the said three tracts here above demanded. The said lines encompassing in their extent all the waters of the above-mentioned rivers, La Charette, *alias* Dardenne, and Au Cuivre, in order that hereafter the petitioner may erect saw and grist-mills thereon; also place there a number of cattle, have slaughter-houses, and send salt meat to the capital. And the petitioner shall render thanks to your goodness.

"J. CLAMORGAN.

"ST. LOUIS, March 1st, 1797."

On the 3d of March, 1797, Lieutenant-Governor Trudeau, in response to the said "requette" addressed to him by Clamorgan, made the concession, of which (pp. 128, 129, printed record) the following is a translation: —

"Don Zenon Trudeau, Captain of the regiment of Louisiana, Lieutenant-Colonel by brevet, and Lieutenant-Governor of the western part of Illinois.

"Cognizance being taken of the statement made by Don Santyago Clamorgan, and the governor-general, the Baron de Carondelet, have particularly recommended to me to facilitate and protect the discovery and commerce of Upper Missouri, in which the above named Clamorgan has engaged at my entreaties; considering the losses which said enterprise has occasioned to him, and the new expenses to which he shall have to contribute on account of the same undertaking; and how important it is to favor and extend the discoveries herebefore mentioned, without prejudice to the royal treasury, and to the interest and welfare of those settlements, but on the contrary, in contributing to their prosperity by drawing new inhabitants: For these considerations, and on account of the said Clamorgan having

rendered himself worthy and deserving of the favors of the government, the surveyor of this jurisdiction (as soon as the occupations of his place will permit) shall survey, in favor of the party interested, the extent of land he solicits, in the way and manner described in the foregoing document, which, together with the plat and certificate of survey, and of the boundaries which shall be set (to said land), will, form the title of concession, which in due time he shall have to lay before the general government of the province, in order to get its approbation and record.

" ZENON TRUDEAU.

" ST. LOUIS, March 3d, 1797."

Thereafter, on July 3, 1797, Lieutenant-Governor Trudeau wrote to Clamorgan, intimating the approval by the governor-general, Baron de Carondelet, of the concession. The following (see pp. 129, 130, printed record) is a translation of the letter: —

" ST. LOUIS, July 3d, 1797.

" Under date of April 5th of this current year, the governor-general, Baron de Carondelet, writes to me as follows: —

" 'I have read your official note, dated 11th of last March, in which you state the motives which have induced you to grant to Mr. Clamorgan the tract of land situated between the two rivers Charette and Cuivre, both emptying into the Mississippi; also sixty arpents to the south of said rivers, which serve to determine the situation of said land, having the Mississippi in front. Two parallel lines are to be drawn, running in the interior of the country until they reach at the distance of two hundred arpents beyond the foot of the first hills, conformably to the solicitation of the party interested.

" 'All which I do approve, Clamorgan having deserved this favor from the government.'

"I transmit the same to you for your knowledge and government.

"May God have you in his keeping many years.

"ZENON TRUDEAU.

"S'or Don Santyago Clamorgan."

On the 27th of June, 1808, Clamorgan gave notice in writing, to the recorder of land-claims for the Territory of Louisiana, describing the concession as a grant of three tracts of land, the central tract containing five hundred thousand arpents, the others comprising each sixty arpents of front on the Mississippi River, and specifying the boundaries thereof. (p. 131, printed record.) Various estimates have been formed as to the quantity of land called for by the grant. This appellant contends that the quantity necessary to satisfy the call is six hundred and seventy-five thousand acres, as appears by the maps "E" and "F," which form part of the transcript.

It is now necessary to trace the course of legislation adopted by Congress to carry out and give effect to the treaty obligations undertaken by the United States under the treaty of Paris, of 1803, in regard to grants of land made by previous sovereigns. In 1805 (March 2d), an act was passed by Congress (2 Stats. at Large, 324) providing for a board of commissioners of land-claims in the District of Louisiana. This act was enlarged and amended by a subsequent act, approved March 3, 1807. (2 Stats. at Large, 440.) Before this board Clamorgan appeared and claimed the three tracts in question. On November 14, 1811, the board, without assigning any reason whatsoever, rejected the claims thus made (see pp. 131, 132, printed record), and in their report to Congress so stated. (American State Papers, "Public Lands," vol. 2, p. 559, Green's ed.) No action was taken by Congress thereon. (Ibid, p. 388.)

Subsequently, Risdon H. Price and Charles Frimon Delouviere, by petition, communicated to the House of Repre-

sentatives, January 15, 1818, asked Congress to confirm the grant in question, setting forth the services of Clamorgan at great length, and adducing the proofs of the claim, including the *original* petition of Clamorgan for the grant, the *originals* of the concession, and of the letter of Lieutenant-Governor Trudeau, of date 3d of July, 1797, above referred to; also, the affidavit of James Mackey, of March 7, 1817, likewise referred to above, and other documents. (American State Papers, "Public Lands," vol. 3, p. 267, Green's ed.) Congress did not grant the prayer of this petition; but, on the contrary, on the 26th of May, 1824 (4 Stats. at Large, 52), passed an act for the judicial confirmation of land-titles in Missouri, by which act jurisdiction was expressly denied to the courts of one claim, and only one, that being the claim now before this honorable court. Why that claim should have thus been singled out, it is difficult to say. The only theory on which it can be accounted for is, that at that time there seems to have been a disposition on the part of Congress to guard against confirming grants of immense tracts of land, and at the same time an ignorance of Spanish titles and grants, and of the laws, ordinances, and usages of the Spanish authorities in Louisiana in regard to concessions of land. This, however, has been removed by subsequent legislation and the decisions of this court, enlightened by the knowledge that has since then been thrown on the subject by subsequent researches, which have led to juster views. Further efforts were made by Congress at a later day (Act of July 9, 1832, 4 Stats. at Large, 565, and act of March 2, 1833, Ibid., p. 661), by which another board of commissioners was appointed. This board, in their report to Congress, declined to recommend the Clamorgan claim for confirmaation, on the ground that, in their judgment, the claimant "had abandoned his rights, and had, by neglect of his privileges, forfeited them." (See Pub. Docs. 59, first session Twenty-fourth Congress, pp. 4, 5, 6, 401, 421.) No direct action was had by Congress on adverse reports of

the commissioners. Next followed the act of June 17, 1844 (5 Stats. at Large, 676), by which the act of May 26, 1824, was modified, and revived for five years. The bar against the Clamorgan claim, imposed by the last-mentioned act, still remained in force. It was not until the act above referred to, of June 22, 1860, and the acts amending and reviving the same (under which the present claim is now made), that Clamorgan's representatives could obtain a hearing of their claims before a court of justice.

But while all these contests were progressing before the boards of commissioners appointed by the various acts, and while all this legislation was being had, what had become of Jacques Clamorgan, and what had become of his claim? The date of his death does not seem to appear of record in this case; but, at all events, he was alive in 1813, when, probably discouraged by the adverse decision above referred to, by the board of commissioners, of date November 14, 1811, rejecting his claim, he, on October 20, 1813, disposed of his rights under the concession, to Jean Elie Tholozau, by deed, for the expressed consideration of "a tract of land situated in the province of the French kingdom, to me ceded this day, by a deed of sale, to me delivered, also for a sum of five hundred dollars," etc. (See translation of deed, pp. 124, 125, printed record.) In that deed the grant is described as containing four hundred and forty-eight thousand arpents in area. This deed is dated at St. Louis, October 20, 1813, and is recorded March 1, 1816. Four days subsequent to the date of this conveyance, the grantee therein, Jean Elie Tholozau, viz., on the 24th of October, 1813, made a deed, reciting that, in consideration of a sum of $1,800 paid by Jean Bte. Pellisier to him, the said Tholozau, said sum being furnished, as the deed declares, by the mother of Cyprian Martial Clamorgan and Maximin Clamorgan, "both natural sons of Jacques Clamorgan, nephews of said Pellisier," he, the said Tholozau, sells, cedes, relinquishes, abandons, and transfers certain lands, and among others, "a land of

four hundred and forty-eight thousand arpents in superfice, situated on the banks of the Mississippi, and on the rivers called "Charet," Dardenne, and Copper, about twenty leagues distant of the town of St. Louis, which I, Jean Tholozau, declare to have acquired of Jacques Clamorgan, on the twentieth day of the month of October of this present year, granted to him by Zenon Trudeau, lieutenant-governor of Upper Louisiana, the 3d of March, 1797, by order of his excellency, the Baron de Carondelet." The consideration expressed in said deed is declared by Pellisier to have been received of the mother "of said Cyprian and Maximin, a long time before her death, to employ the said funds to buy any property whatever for their use and benefit, just as he executes it at this time, by these presents, in several lands hereinafter described." (See deed and translation thereof in printed record, pp. 148–150.) A reservation is made in this deed in favor of the grantor, Tholozau, of one-half of the grant or concession now in controversy, provided said Tholozau obtain the ratification of all the grants conveyed by him in said deed. Never having obtained said ratification, this reservation is, of course, of no force or effect. This deed was recorded in the recorder's office of the county of St. Louis, of date May 9, 1816, and was also recorded October 14, 1816, by "Wm. Christy, J'or, Ex-officio Recorder," but neither the certificate of filing nor the evidence in this case shows of what county he was recorder.

Up to this point there is not, perhaps, much difficulty. But, in 1816, this same Jean Elie Tholozau, the grantee of Jacques Clamorgan, and who had deeded the grant to Cyprian Martial and Maximin Clamorgan, October 24, 1813, did, on the 9th of May, 1816, nearly three years afterwards, convey to Louis Labeaume the same grant. This deed from Tholozau to Labeaume (see translation, pp. 152, 153, printed record) was made for the expressed consideration of $2,000, and was recorded May 9, 1816, the day of its date, by "Wm. Christy, J'or, Ex-officio Recorder," but

neither the certificate of filing indorsed on the deed, nor the evidence in this case, shows of what county he was recorder. From the certificates of John K. McDearmon, *ex officio* recorder of the county of St. Charles, dated respectively in 1873 and 1876, more than sixty years after the execution of the two deeds by Tholozau, above mentioned (see pp. 148–153, printed record), *both* deeds appear to be of record in the office of the recorder last above mentioned, — that is, in the office of the *now* county of St. Charles, Missouri. It will be seen that there is no evidence in this case showing the boundaries either of St. Louis or St. Charles Counties, as they existed in 1813 or 1816, nor is there any evidence as to whether the land granted by the concession now in controversy was located within the boundaries of either of these counties, as they *then* — that is, in 1813 and 1816 — (the date of recordation of the two deeds by Tholozau) existed. The importance of this fact will be shown hereafter in the argument.

The title being thus vested, as this appellant contends, in Cyprian Martial Clamorgan and Maximin Clamorgan, both being, as has been shown, natural children of Jacques Clamorgan, let us trace the successive steps by which the present Clamorgan claimants obtained title. Cyprian Martial Clamorgan died in 1827, and Maximin also died (see the original petition in this case, verfied by oath, p. 6, printed record), but the date of Maximin's death is not in evidence. Cyprian left a will devising, *inter alia*, to his sister Apauline, or Pauline (also a natural child of Jacques Clamorgan), and to her children, Louis, Henry, and Louisa, and to the survivors of them, all the interest and estate to which he was entitled, "in law or in equity, to any lands, lots, or houses in, lying, and being in the State of Missouri, to have or to hold the same as tenants in common, to them and their heirs forever." (p. 156, printed record.) This devise covered whatever interest he had in the concession now in controversy. This will is dated February 22, 1827, and was probated. Maximin, the brother of Cyprian M.,

died intestate, whether before or after the death of Cyprian M. does not appear. The next phase of the history of the case is the death of the above-named Apauline (or Pauline) Clamorgan, the sister of Cyprian M. and Maximin, and one of the devisees under the will of Cyprian M. Apauline left a will dated (according to the record) April 11, 1839, but the real date is 1830, in which year it was probated, as will be seen by the certificate annexed to the will, in which, after various specific devises, she made this devise: —

"*Item.*—I give and bequeath to my said children, Louis, Henry, Louisa, and any and all others hereafter to be born to me, and to the survivor or survivors of them, and their heirs and assigns, all the interest and estate which I may have or be entitled to, in law or equity, to any lands, lots, and houses lying and being within the State of Missouri, to have and to hold the same as tenants in common, and not as joint tenants."

It may be here stated, in order that the links in this chain of history may be kept in view, that the present Clamorgan claimants are all the natural children, or descendants of the natural children, of this Apauline. Henry, mentioned in the will just quoted from, is one claimant, Cyprian, this appellant (born after the date of the will, and by its terms a devisee thereunder), is another; and the other two claimants, Leon A. and Julius, are the lawful children of the Louis Clamorgan, now deceased, one of the children referred to in Apauline's will. The other child, Louisa, according to Henry Clamorgan's testimony (p. 168, printed record), died about the year 1834, unmarried, intestate, and without issue. The present claimants, Henry and Cyprian, are thus the only living issue of Apauline; and the other claimants, Leon A. and Julius, are the lawful children and heirs of Louis, the other surviving child of Apauline.

The next scene is laid in the Missouri Legislature, which,

on March 23, 1863, passed an act (pp. 161, 162, printed record) in the following language: —

"An act for the relief of Henry Clamorgan, Cyprian Clamorgan, and the heirs of Louis Clamorgan, deceased.

"Whereas, the administrator of Cyprian Martial and Maxime Clamorgan did, on the —— day of December, 1859, sell to the highest bidder all the right, title, and interest of his intestates in and to a certain certificate of location, issued by the surveyor-general on the eighth day of August, in the year 1859, to Regis Loisel, or his legal representatives, for thirty-eight thousand one hundred and eleven and ten hundredths acres of land, located in the Territory of Kansas, for the sum of three thousand six hundred dollars.

"And whereas, the said Cyprian Martial and Maxime Clamorgan, at the time of their decease, had no legal heirs according to the laws of inheritance of the State of Missouri, and their estate would therefore, by law, escheat to the State of Missouri.

"And whereas, Henry Clamorgan, Cyprian Clamorgan, and the children of Louis Clamorgan, deceased, are the sole natural heirs of the said Cyprian Martial and Maxime Clamorgan, and alone have a natural claim to the estate of the said intestate estates; therefore,

"*Be it enacted by the General Assembly of the State of Missouri:* —

"Section 1. That the Court of Probate of St. Louis County be authorized and directed, on application of the parties in interest, to hear testimony to ascertain who are the natural heirs or claimants of the estate of Cyprian Martial and Maxime Clamorgan, the deceased intestates.

"Section 2. That when the natural heirs or claimants of said estates are ascertained, the said estates shall be admin-

istered and distributed among such natural claimants according to the laws of distribution, in all respects as if said natural claimants were the legitimate and lawful heirs of said intestates.

"Section 3. That the State of Missouri does hereby relinquish all claim to said estates by virtue of the law of escheats, or otherwise, in favor of the said natural claimants.

"Section 4. That this act take effect from and after its passage.

"Approved, March 23d, 1863."

Pursuant to sects. 1 and 2 of that act, the Probate Court of St. Louis County, on June 22, 1863 (p. 162, printed record), "being satisfied that Henry Clamorgan, Cyprian Clamorgan, Leon Clamorgan, and Julius Clamorgan are the natural heirs of Cyprian Martial Clamorgan and Maximin Clamorgan, and in pursuance of and in conformity to an act of the General Assembly of the State of Missouri, approved 23d March, 1863, entitled 'An act for the relief of Henry Clamorgan, Cyprian Clamorgan, and the heirs of Louis Clamorgan,'" ordered that the administrator *de bonis non*, with the will of Cyprian Martial Clamorgan, "pay to said Henry Clamorgan and Cyprian Clamorgan each the sum of five hundred and thirty dollars and thirty three cents, and to Leon M. Clamorgan and Julius Clamorgan, children of Louis Clamorgan, each the sum of two hundred and sixty-six dollars sixty-six cents." A similar order was made in regard to the estate of Maximin.

From these orders of the Probate Court the administrator at once appealed, but subsequently dismissed his appeal. (See pp. 162, 163, printed record.)

It will be observed that the act of the Missouri Legislature proceeded on the theory that *both* Cyprian M. and Maximin died intestate; whereas, as has been shown above, Cyprian M. left a will. However, the distribution was made on that theory; and the effect of that act was un-

doubtedly to legitimate Henry, Louis, and Cyprian Clamorgan, the natural children of Apauline, who was the sister of Cyprian M. and Maximin Clamorgan. The bearing of this act of the Missouri Legislature will be discussed at length in the argument of the case.

It is proper, here, to call the attention of the court to the fact that, by the original petition in this case, the grant therein sought to be declared as a valid and binding title against the United States is claimed to be vested in the petitioners, in the following proportions: One-third to Henry Clamorgan, one-third to Cyprian Clamorgan (this appellant), and one-sixth each to Leon A. and Julius Clamorgan, the sons of Louis Clamorgan. (See original petition, p. 6, printed record.) It has been agreed between all the parties hereto (see stipulation, pp. 169, 170, printed record) that all the lands embraced in the grant under which petitioners claim have been, before the institution of this suit, so disposed of by the United States that no portion can be patented to the plaintiffs in the event of final confirmation; and that this court shall, in the event of a decision in favor of a severance of the lands in question from the mass of the public domain, adopt one of the six plans in evidence as representative of the severance and give judgment for indemnity lands equal in amount to the quantity contained in such plan.

It may also be proper to state, in regard to the intervening petition of Henry T. Blow, Jr., et al. (p. 45 *et seq.*, printed record), that said petitioners claim as the heirs of Louis Labeaume, in whose favor the *second* deed made by Jean Elie Tholozau, above mentioned, of the lands in controversy was executed; and that they, said Labeaume heirs, claim to have conveyed their interest in the premises to the Clamorgan heirs (petitioners herein), other than Cyprian Clamorgan, this appellant. (See deed, pp. 154, 155, printed record.)

The answer of the United States (pp. 27–30, printed record) to the claim hereinbefore set forth is, in substance,

this: That the deed from Tholozau to Cyprian M. and Maximin Clamorgan was and is fraudulent and void as against Labeaume, the grantee in the second deed executed by Tholozau; that the direction in the concession, that "the surveyor of this jurisdiction" should survey the extent of land solicited, was a condition precedent, which has never been fulfilled; that there never was a separation of the lands from the mass of the public domain, either before or after the cession to the United States of the territory in which said lands were included; that the United States never recognized the claim, but has ignored and repudiated the same; that, prior to said cession, repeated grants of large tracts were made by the government claiming authority within the boundaries of the alleged Clamorgan grant; that the lands shown by plan "F" embrace an area of six hundred thousand acres or more, much larger in extent then was ever claimed by Jacques Clamorgan, and not warranted by anything in the alleged grant; that the above recited act of the Legislature of Missouri had not the effect to constitute Henry Clamorgan and the others therein named the lawful heirs of Cyprian M. and Maximin; that a large number of private land-claims have been surveyed and confirmed within the boundaries of the grant; and that the inducement to the making of the grant was, that Jacques Clamorgan might erect saw and grist-mills, and place cattle on the lands, erect slaughter-houses, and send salt meat to the capital, none of which things were done by him.

The court below decreed in favor of the original petitioners, awarding indemnity lands to the extent of ninety-four thousand one hundred and thirty-six acres (being the extent shown by the plan marked "I"), in the following proportions, viz.: Four-sixths to Henry Clamorgan, one-sixth to Cyprian Clamorgan, and one-twelfth to each of Leon A. and Julius Clamorgan. From that decree the district attorney, as required by law, appeals to this court. Sepa-

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rate cross-appeals have been taken by the petitioners, — one by Cyprian Clamorgan, and one by the other Clamorgan claimants.

ASSSIGNMENT OF ERRORS.

1. The court below erred in adopting the plan marked "I," as showing the lands embraced by the concession in controversy herein.

2. The court below erred in not adopting the plan marked "E," or the plan marked "F," as showing the lands embraced by said concession.

3. The court below erred in adjudging that this appellant, Cyprian Clamorgan, was only entitled to one-sixth of the lands covered by said concession.

4. The court below erred in not adjudging that said Cyprian was entitled to one-third of said lands.

5. The court below erred in adjudging that Henry Clamorgan was entitled to four-sixths of said lands.

6. The court below erred in not adjudging that said Henry was only entitled to one-third of said lands.

7. The court below erred in allowing to be filed, without the consent of this appellant, Cyprian Clamorgan, nearly three months after the decree was rendered in the case, the proof of the heirship of the parties claiming to be the heirs of Louis Labeaume.

ARGUMENT.

In order to establish the claim of this appellant, Cyprian Clamorgan, it will be necessary to demonstrate the following propositions: —

1. That the grant or concession by Lieutenant-Governor Trudeau to Jacques Clamorgan, confirmed by the governor-general, the Baron de Carondelet, was a complete and valid grant, absolutely, and without any condition, either precedent or subsequent.

2. That by the grant or concession there was a separation of the lands granted from the mass of the public domain, thereby operating as a valid and binding title against the United States, under the treaty of Paris of 1803, the law of nations, and the laws of the United States.

3. That the deed from Jean Elie Tholozau to Cyprian M. and Maximin Clamorgan conveyed a title paramount to that claimed by the Labeaume heirs under the deed from Tholozau to Louis Labeaume.

4. That the present Clamorgan claimants are the lawful heirs and representatives of Cyprian M. and Maximin Clamorgan.

5. That the plans or maps marked "E" and "F," respectively, and which form part of the transcript herein (pp. 337–339, transcript), show the true area of the land conveyed by Lieutenant-Governor Trudeau's grant.

These propositions will be taken up and discussed in the order above set forth.

I.

The grant or concession by Lieutenant-Governor Trudeau to Jacques Clamorgan, confirmed by the governor-general, the Baron de Carondelet, was a complete and valid grant, absolutely, and without any condition, either precedent or subsequent.

After the cession of Louisiana, by France, to the United States, it appears to have been the policy for a long time, on the part of the authorities, to discountenance the confirmation of grants made in that territory by its previous sovereigns, on two grounds, viz., the vastness of the grants, some of which were equal to a European principality, and the supposed want of power on the part of the Spanish governors to make such grants. Hence it doubt

less was that the present claim has, as was shown in the statement of the case (*supra*), been rejected twice by the board of commissioners appointed to investigate and report on land-claims, and that the claim was singled out by Congress, in the act of May 26, 1824 (4 Stats. at Large, 52), providing for the judicial confirmation of land-titles in Missouri, as the only claim of its kind to which the benefits of that act should not extend. This policy, founded in ignorance of the Spanish laws, customs, and ordinances, was destined to give way to wiser counsels, brought about by the light thrown on the subject by later investigations. About the year 1829, Mr. White, in his compilation known as "White's Recopilacion," threw a flood of light on the subject of Spanish land-titles. Shortly thereafter, in 1832, this court, in the case of the United States *v.* Arredondo, 6 Pet., 691, recognized the validity of grants by Spanish officials, and their binding effect on the United States under the treaty obligations undertaken by the latter. In that case the court uses the following language (pp. 728–730): —

"The grants of colonial governors, before the Revolution, have always been, and yet are, taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands. Its actual exercise, without any evidence of disavowal, revocation, or denial by the king, and his consequent acquiescence and presumed ratification, are sufficient proof, in the absence of any to the contrary (subsequent to the grant), of the royal assent to the exercise of his prerogative by his local governors. This or no other court can require proof that there exists in every government a power to dispose of its property; in the absence of any elsewhere, we are bound to presume and consider that it exists in the officer or tribunal who exercises it by making grants, and that it is fully evidenced by occupation, enjoyment, and transfers of property had and made under them, without disturbance by any superior power, and

respected by all coördinate and inferior officers and tribunals throughout the State, colony, or province where it lies.

"A public grant, or one made in the name and assumed authority of the sovereign power of the country, has never been considered as a special verdict, capable of being aided by no inference of the existence of other facts than those expressly found or apparent by necessary implication. An objection to its admission in evidence, on a trial at law or a hearing in equity, is in the nature of a demurrer to evidence on the ground of its not conducing to prove the matter in issue.

"If admitted, the court, jury, or chancellor must receive it as evidence both of the facts it recites and declares leading to, and the foundation of the grant, and all other facts legally inferable by either, from what is so apparent on its face. Taking, then, as a settled principle, that a public grant is to be taken as evidence that it issued by lawful authority, we proceed to examine the legal effect of a Spanish grant, in adjudicating on their validity, by the principles of justice in a court, and by the rules of equity, evidence, and law, directed by the act of 1824, which forms a part of the law under which their validity is submitted to our judicial consideration.

"The validity and legality of an act done by a governor of a conquered province depends on the jurisdiction over the subject-matter delegated to him by his instructions from the king, and the local laws and usages of the colony, when they have been adopted as the rules for its government. If any jurisdiction is given, and not limited, all acts done in its exercise are legal and valid; if there is a discretion conferred, its abuse is a matter between the governor and his government, etc. King *v.* Picton, late Governor of Trinidad, 30 St. Tr. 869–871.

"It is an universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a

subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive (1 Cranch, 170, 171), legislative (4 Wheat. 423; 2 Pet. 412; 4 Pet. 563), judicial (11 Mass. 227; 11 Serg. & R. 429, adopted in 2 Pet. 167, 168), or special (20 J. R. C. L. 739, 740; 2 Dowl. P. C. 521, etc.), unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law."

Elsewhere in that decision, views are expressed supporting those here sought to be enforced.

Two years later, in 1834, this court, speaking of Spanish titles, Chief Justice Marshall delivering the opinion of the court, in the case of the United States *v.* Clarke, 8 Pet. 436, said: —

"These titles are to be valid to the same extent as if the territories had not been ceded. What is that extent? A grant made by a governor, if authorized to grant lands in his province, is *primâ facie* evidence that his power is not exceeded. The connection between the crown and the governor justifies the presumption that he acts according to his orders. Should he disobey them, his hopes are blasted and he exposes himself to punishment. His orders are known to himself and to those from whom they proceed, but may not be known to the world.

"Such a grant, under a general power, would be considered as valid, even if the power to disavow it existed, until actually disavowed. It can scarcely be doubted, so far as we may reason on general principles, that in a Spanish tri-

bunal a grant, having all the forms and sanctions required by law, not actually annulled by superior authority, would be received as evidence of title. * * *

"It will not be material to ascertain the rules by which lands were granted to the first settlers of America, or the officers from whom titles emanated. So early as the year 1735, an ordinance was passed by which the king reserved to himself the right of completing the titles given by his provincial officers.

"The inconvenience resulting from this regulation was so seriously felt that the ordinance was repealed in 1754, and the whole power of confirming, as well as originating titles, was transferred to officers in the colonies. The power of appointing sub-delegate judges, to sell and compromise for the lands and uncultivated parts of the dominions of the Spanish crown in the Indies, was declared to belong to the viceroys and presidents of the royal audiences of those kingdoms; and the same royal order directed that in the distant provinces of the audiencias, or where sea intervenes, — as Caraccas, Havana, Carthagena, Buenos Ayres, Panama, Yucatan, Cumana, Margarita, Puerto Rico, and in others of like situation, — confirmations shall be issued by their governors, with the advice of the *officiales reales* (the king's fiscal ministers), and of the lieutenent-general, *hateado*, where he may be stationed.

"In 1768, this power of granting and confirming titles to lands was vested in the intendants.

"In 1774, it was revested in the civil and military governors. (See White's Compilation, 218.) In October, 1798, this power was again conferred on the intendant, so far as respected Louisiana and West Florida; but this order did not extend to East Florida. In that province it remained in the governor.

"The regulations of the Governors O'Reilly and Gayozo, and the proceedings of the Governors Quisada, Estrada, White, Kindelan, and Coppinger, of East Florida, and all the grants which have been brought to the view

of this court, together with the reports of the commissioners appointed to adjust land-titles in the territories ceded by Spain, show that from the year 1774 the power of granting lands was vested in the governors both of Louisiana and the Floridas. The ordinance of 1798, which transferred it to the intendant of Louisiana and West Florida, did not extend to East Florida; consequently, it remained with the governor of that province."

In the same case, Chief Justice Marshall, descanting on the policy and object of Spain in regard to its settlements in America, says: —

"The object of Spain, as of all the European powers who made settlements in America, was to derive strength and revenue from her colonies. To accomplish this, grants of land to individuals became indispensable. History informs us that this measure was adopted by all. The immense territories held by Spain, affording an almost inexhaustible fund of lands claimed by the crown, could scarcely fail to produce large grants to favorites, as well as a regular system for inviting population into her colonies. The viceroys in New Spain and Peru, who were also governors, possessed almost unlimited powers on this and other subjects; but in distant provinces, or where sea intervenes, the right of giving title to lands was vested in their governors, with the advice of the king's fiscal ministers, and of the lieutenant-general, where he may be stationed. No public restraint appears to have been imposed on the exercise of this power. The officer and his conduct were, of course, under the supervision and control of the king and his ministers, and especially of his council in the Indies.

"In 1735 this power was withdrawn from the provincial officers, but was restored to them in 1754. (White's Compilation, 49; Clarke's Land Laws, 973.) The royal order of 15th October, 1754, confers this power in general terms, without any limitation on the quantity or on the consideration which may move to the grant. It would excite surprise if, in a monarchy like that of Spain, no

rewards in land could be granted for extra services, and no favors could be bestowed. Amongst the earliest laws for the government of America (White's Compilation, 30) is an order that the viceroys of Peru and Mexico 'grant such rewards, favors, and compensation as to them may seem fit.' A subsequent order (White's Compilation, 41), after directing extensive dispositions of territory, adds: 'All the remaining land may be reserved to us, clear of any encumbrance, for the purpose of being given as rewards, or disposed of according to our pleasure.' In White's Compilation, 29, we find the following law: 'It is our pleasure that services be renumerated where they shall have been performed, and in no other place or province of the Indies.'

"It would seem that these renumerations, if in land, would be made by the governor, when empowered to grant them, provided no other officer was designated."

The doctrine so clearly enunciated in those two decisions have been followed in numerous cases determined by this court. Among others that might be mentioned are: —

Delassus *v.* United States, 9 Pet. 117;
United States *v.* Segui, 10 Pet. 306;
United States *v.* Rodman, 15 Pet. 130;
United States *v.* Sutherland, 19 How. 363;
United States *v.* Lynde, 11 Wall. 632.

There are many other authorities to the same effect.

Nothing can be clearer than that the present case comes within the principles laid down in the cases above cited. The power to grant lands in Louisiana in 1797 was, as has been shown, vested in the governor (although in 1798 that power was conferred on the intendant); the power *was* exercised in the grant to Clamorgan, and Clamorgan had rendered valuable services to the Spanish government. All the elements necessary to constitute a complete grant coexist in this case. The great extent of the grant cannot be challenged or criticised, nor can the consideration be

inquired into. As this court says in the case of the United States *v.* Segui (*supra*), "it was exclusively for the governor to judge of the conditions to be imposed on his grant; he appears to have considered the services of the appellee a sufficient consideration, and made the grant absolute." That case bears a striking analogy to the present. There, the petitioner made application to the governor of East Florida for a grant of sixteen thousand acres, "in consideration of his services to the Spanish government, and for erecting machinery for the purpose of sawing timber."

The application of Clamorgan (pp. 126, 127, printed record), after reciting his services and asking the grant which he describes, adds: "In order that, hereafter, the petitioner may erect saw and grist-mills thereon; also place there a number of cattle, have slaughter-houses, and send salt meat to the capital." Now the government, in its answer (p. 30, printed record), says that the inducement to the making of the grant was that Clamorgan would erect saw and grist-mills etc., and that these things Clamorgan failed to do; in other words, the government suggests, if it does not state in so many words, that the doing of these things was a condition subsequent, which was not performed. The same point was raised in the Segui case (*supra*), just referred to, and overruled by the court. Said Baldwin, J., in that case: "It has been suggested by the attorney-general that, though there was no express condition in the grant, one was implied from the consideration being in part the erection of a saw-mill. But we cannot attach any condition to a grant of absolute property in the whole quantity." So here, in the same sense, the grant to Clamorgan was absolute.

But the answer of the United States contends (see answer, p. 29, printed record) that there was a condition precedent imposed by the following language, contained in the grant (see translation, pp. 128, 129, printed record): —

"The surveyor of this jurisdiction (as soon as the occu-

pations of his place will permit) shall survey, in favor of the party interested, the extent of land he solicits, in the way and manner described in the foregoing document; which, together with the plat and certificate of survey, and of the boundaries which shall be set (to said land), will form the title of concession, which, in due time, he shall have to lay before the general government of the province, in order to get its approbation and record."

It would take a great amount of legal skill to evolve from the foregoing language the elements of a condition precedent. Clamorgan asked for a grant of certain land, describing it. His prayer was heard and the grant was made, and approved by the governor-general. The language just quoted above was simply a direction to survey, to have an authoritative ascertainment and record of the boundaries of the land. It was no condition imposed on Clamorgan, but simply a direction to the government surveyor, the "occupations" of whose place seem never to have permitted him to obey the direction. The government's own officer, and not Clamorgan, was at fault. To contend that the surveyor's disobedience to the directions of his superior officer avoided the grant, would be the height of absurdity. The act of June 22, 1860 (12 Stats. at Large, 85), does not make it a prerequisite that a survey should have been made. Its language (sect. 11) is: "Where such lands are claimed by complete grant or concession, *or* order of survey duly executed, *or* by other mode of investiture of the title thereto," etc. It will be observed that the language is in the alternative. The bounty of the government offered by that act was not intended to be limited by the want of a survey, but it was clearly meant to be extended to all grants, whether surveyed or not, provided the grant was so definite and certain as that the limits could be ascertained by survey. This construction of the law is so well settled as not to need a recital of authorities to support it.

Another point made in the answer of the United States

(p. 29, printed record) is, that prior to the cession to the United States, in 1803, and subsequent to the third day of March, 1797 (the date of the Clamorgan grant), "repeated grants of large tracts of land were made by the governments claiming authority within the boundaries of the alleged grant to said Clamorgan." It is sufficient answer to this allegation to say that there is not a particle of evidence adduced in its support, nor do we believe there is the slightest foundation for the allegation. Moreover, "a government is never presumed to grant the same land twice."

United States *v.* Arredondo, 7 Pet. 738.

In view of the decisions above cited, and of the evident purpose and spirit of the act of June 22, 1860 (12 Stats. at Large, 85), it is contended that the facts shown in this case bring it within the act in question, and that a complete and binding title, absolute and indefeasible, was conferred on Clamorgan by the concession.

II.

By the grant or concession there was a separation of the lands granted from the mass of the public domain, thereby operating as a valid and binding title against the United States, under the treaty of Paris of 1803, the law of nations, and the laws of the United States.

The answer of the United States (p. 29, printed record) denies there was a separation of the lands in controversy from the mass of the public domain. The test as to whether such separation took place is prescribed by the act of June 22, 1860 (12 Stats. at Large, 85), in the following language (sect. 11):—

"By separation thereof from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses, and distances, by the competent authority, prior to the ces-

sion to the United States of the territory in which said lands were included, or where such title was created or perfected during the period while the foreign governments from which it emanated claimed sovereignty over, or had the actual possession of, such territory."

In this case, no actual survey appears to have been made. But here was a grant, as has been shown, by the competent authority, prior to the cession to the United States of a territory which included the lands in controversy, such territory being one over which the foreign government from which the grant emanated not only claimed sovereignty, but of which it had the actual possession. So far, all the prerequisites of the act are thus fulfilled, with this exception, namely, the definition in the grant of "fixed natural and ascertainable boundaries or initial points, courses, and distances." The only question, then, which is left open is, whether there was such a definition as to satisfy the act.

In discussing this question, the condition of the territory in the early days of Spanish rule must be kept in view. Land was of little value, and large tracts of it were granted without survey, and with little precise definition of boundaries. Consequently, natural boundaries were for the most part selected, instead of courses and distances. Rivers and hills (as in this case) were selected as boundaries, and any measurements given were generally vague. That these facts have a bearing upon, and form an important consideration in construing the act of Congress, is very clearly and convincingly stated in the case of the United States *v.* Sutherland, 19 How. 363, above referred to. In that case the court says: —

"The only question arising in this case, which has not been disposed of in former decisions of this court, is the objection 'that the grant is void for uncertainty,' because it defines neither boundaries nor quantity. The authenticity of the grant and confirmation are proved, and do not appear to have been disputed before the commissioners. It is in

evidence, also, that Doña Maria and her husband went into possession of the place called 'El Cahon,' in the year 1845, and have made it 'the best cultivated rancho in the country about San Diego.' It had formerly belonged to the mission of San Diego. The mission was in debt to the husband of Doña Maria, and agreed to transfer their right of occupancy on this rancho to her, in satisfaction of her husband's debt. * * *

"In construing grants of land in California, made under the Spanish or Mexican authorities, we must take into view the state of the country and the policy of the government. The population of California, before its transfer to the United States, was very sparse, consisting chiefly of a few military posts and some inconsiderable villages. The millions of acres of land around them, with the exception of a mission or a rancho on some favored spot, were uninhabited and uncultivated. It was the interest and the policy of the king of Spain, and afterwards of the Mexican government, to make liberal grants of these lands to those who would engage to colonize or settle upon them. Where land is plenty and labor scarce, pasturage and raising of cattle promised the greatest reward with the least labor. Hence, persons who established ranchos required and readily received grants of large tracts of country as a range for pasturage for their numerous herds. Under such circumstances, land was not estimated by acres or arpents. A square league, or 'sitio de ganado mayor,' appears to have been the only unit in estimating the superfices of land. Eleven of these leagues was the usual extent for a rancho grant. If more or less was intended in the grant, it was carefully stated. Surveying instruments or surveyors were seldom to be obtained in distant locations. The applicant for land usually accompanied his petition with a diseño, or map, showing the natural boundaries or monuments of the tract desired. These were usually rivers, creeks, rivulets, hills, and mountain ranges. The distances between these monuments were often

estimated at *about* so many leagues, and fractions of this unit little regarded. To those who deal out land by the acre, such monuments as hills, mountains, etc., though fixed, would appear rather as vague and uncertain boundary lines. But where land had no value, and the unit of measurement was a league, such monuments were considered to be sufficiently certain. Since this country has become a part of the United States, these extensive rancho grants, which then had little value, have now become very large and very valuable estates. They have been denounced as 'enormous monopolies,' 'princedoms,' etc., and this court have been urged to deny to the grantees what it is assumed the former governments have too liberally and lavishly granted. This rhetoric might have a just influence when urged to those who have a right to give or refuse. But the United States have bound themselves by a treaty to acknowledge and protect all *bonâ fide* titles granted by the previous government; and this court have no discretion to enlarge or curtail such grants, to suit our own sense of property, or defeat just claims, however extensive, by stringent technical rules of construction to which they were not originally subjected."

In that case the court upheld the grant. And, indeed, if minute accuracy of description were to be insisted on, the act of 1860 would be practically a dead letter. The act was not designed to interpose technicalities, but to avoid them, and to have adjudications made on the broad grounds of "equity and justice."

It is manifest from the evidence in this case, that while there may be inconsistencies and contradictions in the description of the Clamorgan grant, yet that a survey can be made, the boundaries can be ascertained and laid out, and in fact have been ascertained and laid out. If that is so, then the grant is sufficiently definite to satisfy the act. Let us see what is the testimony on this point.

Thomas E. Evershed, whose acquaintance with Spanish

titles and surveys (see his evidence, p. 76, printed record) is very extensive, testifies (p. 79, printed record) that the language of the grant is such that any man of ordinary intelligence can understand, and that in his opinion the map or plan "F" (containing six hundred and seventy-five thousand acres; see printed record, p. 338) is altogether correct.

William H. Cozzens, a surveyor of wide experience in Spanish-grant surveys (pp. 102, 103, printed record), and a witness called on behalf of the United States, testifies that his "experience in all such calls of large tracts is, that there has been more or less ambiguity." Then, being asked the question, "You consider, then, the Clamorgan grants exceptionally well described, when divested of the conflicting calls for course and distance?" he answered, "Yes sir. If you divest them of those calls, parallel lines, and courses and distances beyond the bluffs, then I could run them out.

"Q. You consider them exceptionally well described, so divested?

"A. Yes, sir."

Counsel for this appellant has not before him the six maps or plans produced in this case, the originals having accompanied the transcript of appeal, and he is therefore unable here to make any thorough analysis of the evidence of the expert witnesses, who had before them while they testified, and who referred to these maps in their testimony. But I understand that counsel for the other appellants, in their brief, have ably and exhaustively presented this branch of the case. It will therefore be sufficient here to say, on this point, that, as has been shown above, the government's chief witness in this case, Mr. Cozzens, describes the Clamorgan grant as exceptionally well described, all such grants being more or less ambiguous, and that, divested of the conflicting calls for course and distance, he could run out the lines of the grant.

That, where there is a call for courses and distances in

conflict with a call for natural objects, the former must yield to the latter, is a well settled principle of law.

McIvers *v.* Walker et al., 9 Cranch, 173;
Newsom *v.* Pryor's Lessee, 7 Wheat. 7;
Holmes et al. *v.* Trout et al., 7 Pet. 171;
Bolton *v.* Lann, 16 Texas, 96;
2 Ph. on Ev. 783;
Den *v.* Wright, Pet. C. Ct. 64;
Pernam *v.* Wead, 6 Mass. 131.

Hence, by rejecting the call for courses and distances, and adopting the natural boundaries mentioned in the grant, "the said lines [according to the words of Clamorgan's petition] encompassing in their extent all the waters of the above-mentioned rivers, La Charette, *alias* Dardenne, and Au Cuivre," there is no ground for alleging that the grant is void for uncertainty. Therefore the separation from the mass of the public domain was effected, in this case, by "the definition of fixed natural and ascertainable boundaries or initial points" (sect. 11 of the act, *supra*), and, as such, the grant was protected by the treaty of Paris of 1803, as well as by the law of nations, which respects and protects private property in a territory where a change of sovereign takes place, even when the territory is conquered by arms.

United States *v.* Percheman, 7 Pet. 86;
Delassus *v.* United States, 9 Pet. 133.

The treaty in question has been quoted from (*supra*) in the statement of the case, and by its second article it declares that in the cession made by the first article thereof are included public lots and squares, vacant lands, etc., etc., "which are not private property," while art. 3 provides for the protection of the inhabitants of the ceded territory "in the free enjoyment of their liberty, property, and the religion which they profess." (8 Stats. at Large, 200.)

III.

The deed from Jean Elie Tholozau to Cyprian M. and Maximin Clamorgan conveyed a title paramount to that claimed by the Labeaume heirs under the deed from Tholozau to Louis Labeaume.

By deed dated October 25, 1813, and recorded March 1, 1816, by "Wm. Christy, Jr., Ex Officio Recorder" (of what county, district, or territory does not appear), Jacques Clamorgan, the pioneer and explorer, to whom the grant in controversy was given, sold and transferred the lands covered by the said grant to Jean Elie Tholozau, for a valuable consideration, expressed in the deed, the consideration being partly money and partly land. (See translation of this deed, pp. 144, 145, printed record.) Tholozau, being thus vested with the title to the lands so granted, conveyed the same, first, to Cyprian M. and Maximin Clamorgan, natural sons of Jacques, for a valuable consideration in money, declared to be furnished by their mother, "a long time before her death;" and, second, to Louis Labeaume, also for a valuable consideration in money.

The deed by Tholozau to the two sons of Clamorgan is admitted by all the parties to be first in point of date, it being executed October 24, 1813 (see translation of the deed, pp. 148–150, printed record), while the deed by Tholozau to Labeaume was executed May 9, 1816. (See translation thereof, pp. 152, 153, printed record.) Now, this deed of Tholozau to the two Clamorgans is attacked both by the United States and by those claiming to be the heirs of Labeaume; and the ground of attack by both is, that said deed is fraudulent and void as against Labeaume, because the deed to Labeaume was recorded before the deed to the Clamorgans. But an examination of the record shows that both deeds were recorded on the same day, the ninth day of May, 1816. It is true that the deed to the Clamorgans was again re-

corded October 14, 1816, by another officer than the one who first recorded it. This subsequent recording (October 14, 1816) was by William Christy, Jr., *ex officio* recorder, the officer who recorded the deed to Labeaume, on the ninth day of May, 1816. It is assumed, both by the United States and by those claiming to be the heirs of Labeaume, that the deed to Labeaume was recorded May 9, 1816, by the recorder of the county of St. Charles; and that, as the deed to the Clamorgans was not recorded in that county till October 14, 1816, although recorded in St. Louis County May 9, 1816, the deed to Labeaume must prevail over the deed to the Clamorgans. But the position thus taken is based on a pure assumption that this Christy was the recorder of St. Charles County, and on the further assumption that, that being the fact, it is sufficient to cut out the deed to the Clamorgans. But neither of these assumptions is supported by a particle of evidence. The lands claimed under the grant are not said to be in the county of St. Charles, as it existed at the date of the recording in 1816, nor in the county of St. Charles as now established, but in the counties of St. Charles *and* Lincoln. No evidence is attempted to be offered as to what were the boundaries of St. Charles County in 1813 or 1816, or to show that the lands in controversy were not then in St. Louis County, as established at that time. A similar question lately arose in the Supreme Court of Missouri in an action of ejectment in regard to lands in the present county of Jefferson, Missouri. That court there said: —

"This deed having been recorded in St. Louis District in 1808, and no evidence of the boundaries of the districts as they existed at that time having been adduced, we must presume that the deed was properly recorded in that district. Such was the ruling of this court in Miller *v.* Dunn, 62 Mo. 225, with reference to a deed recorded in New Madrid District in 1808."

Smith *v.* Madison, 67 Mo. 700.

That being the settled law in Missouri, is it not (and if this court will at all give weight to the dates of recording), as a rule of property, binding on this court; and does it not, under the evidence and facts in this case, raise the presumption that the deed to the Clamorgans, recorded May 9, 1816, was properly recorded? That being so, what becomes of the deed to Labeaume, executed nearly three years after the other and recorded the same day?

But on this point this appellant does not solely rest his case. If, in the present suit, it was sought to obtain specific lands in St. Charles County, Missouri, and if it had been shown that these lands were, in 1816, situated in that county as it then existed, and that the Labeaume deed was recorded in that county May 9, 1816, the point urged by the United States and the Labeaume claimants might have some weight. But neither of these hypotheses can be here maintained. What is sought here is to obtain indemnity lands in lieu of certain other lands in the *present* counties of St. Charles *and* Lincoln, *all* of which have been granted by the United States, by patent, to other parties. This is admitted by the pleadings and the stipulation. (p. 169, printed record.) Moreover, the answer of the United States (p. 29, printed record) expressly avers that before the cession to the United States, and subsequent to the date of the Clamorgan grant, repeated grants of large tracts of land were made by the governments claiming authority within the boundaries of the alleged grant to Clamorgan. Supposing this, for the sake of argument, to be true, there is nothing to show but that these "repeated grants of large tracts of land" included all of the grant so far as situated in St. Charles County. If that be so, then the remaining part of the grant would be in Lincoln County, and any recordation of the Labeaume deed in St. Charles County would be inoperative, and of no force or effect.

In short, the recording of these deeds was, for the purposes of this case, entirely unnecessary and useless, and has no bearing whatsoever on the issues involved. The

Clamorgans claim under a deed made in 1813. That vested the title in Clamorgan's two sons. In 1816, when the deed to Labeaume was made, Tholozau had nothing to convey. The purpose of the registry system for deeds is, that all the world may see the state of any given title,— may know that if there is an outstanding title, it will be of no avail as against a subsequent title, if recorded before that outstanding. The system is also designed to prevent fraud and deception on innocent purchasers without notice. But all this does not affect the case, since we are asking for lands, not in St. Charles County, Missouri, but for a portion of the lands of the United States subject to private entry at $1.25 per acre. Our lands are gone, and we seek others in their stead. We are claiming under what is practically a floating grant, the location of which has yet to be determined. That is the plain English of it. We are not disturbed by the Labeaume bugbear of prior recordation, even if it were in fact prior, because it is clearly immaterial. The court has to determine between the two conveyances by Tholozau, without regard to recording. The deed to the Clamorgans was first, and should be upheld.

On this question of the pretensions of the Labeaume heirs it will be remarked that, while the decree of the court was rendered June 23, 1876 (p. 36, printed record), the proof of heirship of the Labeaume heirs was not filed till September 20, 1876,— nearly three months later. (pp. 70, 71, printed record.) Said proof consists of an affidavit verified of date August 10, 1876. True, it was filed under a stipulation of counsel (p. 171, printed record), which stipulation was filed of date June 22, 1876, and signed on behalf of the petitioners by J. L. Bradford and A. D. Anderson, who did not *then* represent this appellant, Cyprian Clamorgan, they having withdrawn on June 12, 1876. (p. 32, printed record.) Consequently, Cyprian Clamorgan was no party to that stipulation, and cannot be affected by any proofs produced after the decree of the

court below. Therefore, so far as he is concerned, those claiming to be the Labeaume heirs cannot be said to have offered proof of such heirship.

IV.

The present Clamorgan claimants are the lawful heirs and representatives of Cyprian M. and Maximin Clamorgan.

It is a matter of no doubt, and is conceded by all the parties here, that Cyprian Martial Clamorgan and Maximin Clamorgan, as well as Apauline (or Pauline) Clamorgan, were the natural children of Jacques Clamorgan; and also that the present claimants, Henry and Cyprian, and also Louis (deceased, whose lawful sons, Leon A. and Julius, are also claimants herein), were the natural children of said Apauline. That being the case, the question arises as to whether the bar-sinister has been removed. Have they been legitimated, and if so, in what manner? The answer to these questions is, that they have been legitimated by the Legislature of Missouri. As has been shown in the statement of the case (*supra*), the Legislature of Missouri, of date March 23, 1863, passed an act entitled "An act for the relief of Henry Clamorgan, Cyprian Clamorgan, and the heirs of Louis Clamorgan." (A duly certified copy of this act is in evidence, pp. 161, 162, printed record.) By sect. 1 of that act, the Probate Court of St. Louis County was directed "to hear testimony, to ascertain who are the natural heirs or claimants of the estate of Cyprian Martial and Maxime [meaning Maximin] Clamorgan, the deceased intestates." The testimony shows (pp. 162, 163, printed record) that the Probate Court adjudged that Henry and Cyprian Clamorgan, and Leon Clamorgan and Julius Clamorgan (children of Louis Clamorgan), were the natural heirs of Cyprian M. and Maximin Clamorgan, and ordered distribution of a fund then in the administrator's hands, in

the proportion of one-third to Henry and one-third to Cyprian, and one-sixth each to Leon and Julius. All this was done pursuant to the act of the Missouri Legislature just recited. That act, in the amplest terms, relinquished all claim of the State "to said estates, by virtue of the law of escheats or otherwise, in favor of the said natural claimants." The preamble of the act alludes to a specific asset of the decedent's estates, but it also states that the claimants "alone have a natural claim to the estate of the said intestate estates;" and then, by proper enacting clauses, directs the administration and distribution "of the said estates" among the natural claimants, as if they were legitimate. Then the statute, as has been seen, by sect. 3, relinquished all claim, by escheat or otherwise, "to said estates." The language so used is, therefore, broad enough to comprehend *all* the estates of these decedents.

Now, what effect and bearing has this statute of Missouri on the present case? In the opinion of the counsel for this appellant, the statute has a very important bearing, in this way: The title to the concession or grant was vested in Cyprian M. and Maximin Clamorgan by Tholozau's deed, in 1813; they were natural children, incapable of inheriting the one from the other; they died without heirs, and, according to the statute just cited, *both* intestate (of which, more anon); their estates thus became escheated to the State of Missouri; that State relinquished its claim to the escheat in favor of the natural heirs, the present Clamorgan petitioners, as if they were the legal heirs and the inheritance had been cast on them by operation of law.

But, it is contended on behalf of the United States that the statute of Missouri now under consideration, and the proceedings of the Probate Court thereunder, had not the effect, in any manner, to constitute the natural heirs therein named the lawful heirs of Cyprian M. and Maximin; that such proceedings have no force or effect; and that the petitioners acquired no rights thereunder as against the United States. (See answer, p. 29, printed record.)

It is difficult to perceive on what ground this grave allegation is founded. It can only be accounted for by supposing the pleader to have had in his mind some confused notion of a doctrine, which he has misapplied, that a separate State cannot by its legislation bind the United States. That doctrine has no application here. In this case we are proceeding under an act of the Congress of the United States, passed for the adjustment of land claims, providing that "any person or persons, *and the legal representatives* of any person or persons, who claim any lands lying," etc., may make their claims in a certain manner. That the State of Missouri had the title to this property, and transmitted it to the present petitioners, is no reason for attacking the statute by which it thus transmitted such title. That is not such a statute as can be said to bind the United States. It is simply this: The State of Missouri owned some property, and, as it had a perfect right to do, gave it to some of its own citizens. This is all that was done. It is surely not contended that this property, situated within its own borders, did not go by escheat to the State of Missouri, because, like many of the claims under the act of Congress, the boundaries of the tracts granted had not been surveyed. And if the property did become escheat, and if the act of the Missouri Legislature had not been passed, why could not the State of Missouri make its claim, under the act of Congress, as the "legal repre sentative" of these Clamorgans? Why, the act of Congress is an invitation to claimants to come forward and make good their claims. It is not a barrier to claimants. It does not say it will disregard claims made by a State, if it should happen to be the legal representative of a citizen. It practically forbids technicalities. It not only provides that cases under it shall be tried in this court as in other appeals in chancery, but it adds to that clause the words, "and as equity and justice and the principles aforesaid may require." Surely, justice and equity would rather smile with approval than frown upon the righteous statute

of a State which removed a brand from the brow of a citizen.

Let us consider this question in another light. What is claimed in this case is a grant of certain indemnity lands in lieu of that included in the concession of 1797. We seek a *quid pro quo* for certain tangible and defined private property which the United States, by sect. 3 of the treaty of Paris, solemnly guaranteed to protect, and which Congress has agreed to make good to us. It is not an imaginary something that is sought, lying *in nubibus*, but a right, a title, capable of transmission by grant, devise, or inheritance, and which did not lie dormant because the machinery for realizing the right or thing granted was not in motion. It is a property continuously existent since 1797, protected by the treaty aforesaid, and transmitted without break by the acts of the successive owners, or by due operation of law. Says Chief Justice Marshall, in Soulard *v.* United States, 4 Pet. 511, speaking of the treaty of Paris: —

"The term 'property,' as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract, — those which are executory as well as those which are executed. In this respect, the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away."

If the position I have taken in regard to this question is correct, then it undoubtedly follows that the claim under the concession of 1797 became vested in Cyprian M. and Maximin Clamorgan; that at their death it passed by escheat to the State of Missouri; and that, the State having relinquished its rights by the statute above referred to, the property has descended directly to the present Clamorgan claimants.

So far, in discussing this question, the argument has proceeded on the theory that *both* Cyprian M. and Maximin died intestate. Cyprian M. appears, however, to have left a will,

dated February 22, 1827, by which, after certain specific devises, he devised to his sister Apauline, and to her children, Louis, Henry, and Lousia, and to the survivors of them, "all the interest and estate which I may have or be entitled to, in law or in equity, to any lands, lots, or houses in, lying and being in the State of Missouri, to have or to hold the same as tenants in common, to them and their heirs forever." (p. 156, printed record.) It will be observed that this all-comprehensive devise is inconsistent with and repugnant to the specific devises of the will, which are all of property in the city of St. Louis. This will appears to have been probated in 1827, the year in which the will was made.

Yet in 1863, nearly forty years afterwards, the Legislature of Missouri, by the legitimating act above referred to, declared both Cyprian M. and Maximin to have died intestate, and directed the distribution of the asset described in the act among the heirs thereby legitimated, in proportions such as they would have been entitled to had the decedents both died intestate; but not if the will of Cyprian M. had been regarded, because the present appellant, Cyprian Clamorgan, was not a devisee under the will of Cyprian M., he not having been born until after the latter's death. What took place in that long interval between the probate of the will, in 1827, and the legitimating act of 1863, to change the *status* of affairs, so that in the latter year Cyprian M. was declared by the Legislature of Missouri to have died intestate, and distribution of his estate ordered to be made accordingly, the record in this case does not disclose. Nor is counsel for this appellant, he not having participated in the preparation of the proofs, at all aware why this is so. The probate of the will may have been set aside, or in some other mode the will may have been nullified. However, this is not the place for conjecture, and we must assume that the Legislature of Missouri, by the act aforesaid (pp. 161, 162, printed record), expressed a fact when it declared that *both* these Clamorgans died intestate, and directed the distribution of their estates to be made

accordingly. At all events, this court will, if these Clamorgan claimants make good their case, doubtless adopt the rule of distribution prescribed by that act, especially in the absence of all explanation here of this seeming inconsistency. The act of Missouri in question may very properly be regarded as a special statute of distributions as to these Clamorgans' estates, and be followed by this court. In that event, the respective shares of any lands that may be awarded by this court to the Clamorgan petitioners (should the Tholozau deed of 1813 be upheld) would be, as prayed in the original petition, one undivided third part to Henry Clamorgan, one undivided third part to Cyprian Clamorgan, and one undivided sixth part to each of Leon A. and Julius Clamorgan, and not in the proportions decreed by the court below. The mode of distribution thus suggested would not only have the merit of being eminently just, but would at the same time relieve the court from the necessity of considering another question which I shall now proceed to discuss.

Apauline Clamorgan, the natural sister of Cyprian M. and Maximin, also left a will, which is dated April 11, 1830. (The transcript shows April 11, 1839, but the actual date is April 11, 1830, and in fact the will was probated May 12, 1830. See pp. 157–159, printed record.) If the theory above suggested, that the will of Cyprian M. is not, for the purposes of this case, to be regarded, then Apauline's will has no bearing here. But if the court should rule that the will of Cyprian M. *is* to be regarded, and *is* to be considered a factor in determining the ratio of distribution in this case, then Apauline's will would have to be considered. It will be remembered that she was a devisee under the will of Cyprian M., her brother. In the general devise contained in his will (see p. 156, printed record), Apauline and her children, Louis, Henry, and Louisa, and the survivors of them, were the devisees. Louisa died in 1834, according to Henry Clamorgan's affidavit. (p. 168, printed record.) Apauline was thus sur-

vived by her children Louis and Henry, and also by this appellant, Cyprian, who, it seems, was born after the date of the will, and is, according to its terms, a devisee thereunder. If the will of Cyprian M. is to stand, Apauline took, under the general devise therein as aforesaid, an undivided one-fourth interest, her three children therein named each taking a similar share. That gave to Apauline one-fourth of the share of Cyprian M. in the concession now in controversy, deeded to him and his brother Maximin by Tholozau; which share being one-half, Apauline therefore took one-eighth of the lands in controversy. By *her* will this appellant, Cyprian Clamorgan, as one of her children, took one-third of her share of said lands (the child Louisa being excluded, as having died in 1834 without issue). This would give to this appellant, Cyprian Clamorgan, by right of his mother's will, one-third of one-eighth, or one-twenty-fourth of the whole lands in controversy. He would also be entitled to share equally with his brothers, Louis and Henry, in Maximin's half of the property, being one-sixth to each, of the whole. This gives, taking the above method of computation, to this appellant, Cyprian Clamorgan, an undivided five-twenty-fourths of the whole lands. But the previous method of computation pointed out above is more in consonance with the justice and the law of this case, and should be given effect to.

V.

The maps or plans marked, respectively, "E" and "F," show the true area of the lands embraced in the concession by Lieutenant-Governor Trudeau, amounting to six hundred and seventy-five thousand acres.

This proposition has, to some extent, been already discussed in the former part of this argument. The point here made can be more readily and more properly demon-

strated in an oral argument, in which the maps adduced can be referred to, than in a written argument. It is sufficient here to state that the fact that the grant now in controversy was so extensive, is no valid objection to this claim. This is well settled law.

United States *v.* Sutherland, 19 How. 363;
United States *v.* Arredondo, 6 Pet. 719, and other cases *supra*.

Moreover, in the former of these cases, it was also held that if the grant is of such a character that a surveyor could lay off the land, the grant is good and must be confirmed. The petitioners in this case claim that the evidence shows that the grant under which this claim is made is of such a character as that a surveyor could lay off the land. This point has already been discussed above.

That the grant was intended to cover, and did cover, large tracts of land cannot be doubted. The affidavit of James Mackey, of March 7, 1817 (pp. 142, 143, printed record), recites at length the great services rendered by Jacques Clamorgan to the king of Spain, and that the grant in question, given in recompense, was "supposed by the parties themselves, and others, to contain four hundred and forty-seven thousand two hundred arpents, or thereabouts, according to the then exhibited conjectural plat." And before the board of commissioners appointed by virtue of the acts of Congress above referred to, Jesse Richardson testified (pp. 139, 140, printed record) that "he knew Jacques Clamorgan, deceased, and always understood among the old inhabitants of that country that the said Clamorgan had been in the employment of the Spanish government, and that the Spanish government was largely indebted to said Clamorgan; and that, by way of remunerating said Clamorgan for his services, and compensating him for what the government owed him, large grants of land were made

to said Clamorgan, particularly a large tract laying on the Mississippi and on the rivers Dardenne and Cuivre. This tract was looked upon by the old inhabitants under the Spanish government as said Clamorgan's property." This witness being asked the following question by the commissioners: "Do you know the quantity and boundaries of said tract?" replied: —

"I do not know the boundaries of said tract; I understood it was very large, embracing a great portion of the lands lying in the fork of the Missouri and Mississippi. And this affiant has always heard the people expressing their fears that this claim would be confirmed, and deprive those settled on it of their possessions. This affiant understood the land was about five hundred thousand arpents; that it lay on the Mississippi, extending from above the mouth of the Cuivre to below the mouth of the Dardenne and back, for quantity.

"Question by commissioners. Did you ever hear this claim spoken of as fraudulent?

"Answer. Never, but on the contrary; and always understood that it was made to Clamorgan to pay him what the Spanish government owed him as a reward for his services. I never heard any person who was interested against this claim pretend that it was fraudulent, or any person whatever."

This testimony of Mackey and Richardson is entitled to great weight. It is the testimony of contemporaries, and it is well settled law that evidence of general reputation at the time such grants were made is admissible.

1 Ph. on Ev. 221;
1 Greenl. on Ev., sect. 145.

In conclusion, counsel for this appellant will say that the evidence in this case shows that Jacques Clamorgan did undoubtedly render valuable services to the Spanish gov-

ernment; that the grant made to him by Lieutenant-Governor Trudeau was to recompense him for these services; and that such grants were usual at that time, and was the ordinary mode of compensation for services rendered to the government. I respectfully submit that it has been shown that the grant was a complete and valid one, binding on the United States, not only by the law of nations, but by the express obligations assumed by the United States in the treaty of Paris of 1803, and a grant that in all particulars comes within the act of Congress of June 22, 1860, and the acts reviving the same. No suggestion that the grant was fraudulent has been made, so as to deny it the benefit of these acts. That Clamorgan and his representatives were not idle in seeking to enforce their claim has been clearly demonstrated. From ignorance, and perhaps hostility, on the part of the authorities, the claim was time and again rejected; and now, for the first time, has the case come before a court of justice for adjudication, — a court that, by the wise legislation of 1860, and subsequent acts, is required to decide according to "equity and justice." What can be more equitable and just than that, after the lapse of eighty years, the descendants of the hardy pioneer, Jacques Clamorgan, after the door for redress has been so often shut upon them, should now reap the fruit of their ancestor's services. The bar-sinister, which would have prevented them from enforcing the claim, has been removed. The just and equitable legislation of Missouri, as has been shown, removed this bar. Nothing but the claim of the Labeaume heirs stands between them and victory. That claim has no merit, in view of the prior deed to Cyprian M. and Maximin Clamorgan. Every principle of equity and justice requires that the deed to these sons of Jacques Clamorgan should be upheld, and that their descendants, legitimated as they have been, should now receive, through the bounty of Congress, that which, in strict law, the lapse of time has barred, but which the justice invoked and prescribed by

Congress ought to award them. The appellant, wearied of delays, at this late day looks hopefully to this honorable court for that redress and compensation to which he thinks he is entitled, and which has been so long denied him.

Respectfully submitted,

WILLIAM R. WALKER,

Counsel for Cyprian Clamorgan.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

THE UNITED STATES, APPELLANTS, *against* HENRY CLAMORGAN AND OTHERS. } No. 307.

HENRY CLAMORGAN AND OTHERS, APPELLANTS, *against* THE UNITED STATES. } No. 308.

CYPRIAN CLAMORGAN, APPELLANT, *against* THE UNITED STATES } No. 320.

PHILADELPHIA BAR ASSOCIATION

BRIEF FOR THE UNITED STATES.

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THE UNITED STATES. } No. 308.

CYPRIAN CLAMORGAN, APPELLANT,
against
THE UNITED STATES. } No. 320.

BRIEF FOR THE UNITED STATES.

These are three cases brought under the acts of June 22, 1860, and June 10, 1873, upon a private claim for land in the State of Missouri, said to have been granted on the 3d of March, 1797, by Spain to one James Clamorgan.

The original petition was filed July 28, 1873, by Henry, Cyprian, Leon A., and Julius Clamorgan, as representatives of said James. The answer of the United States having alleged that James Clamorgan had sold his in-

terest in the land, and the same had thereafter vested in one La Beaume, a petition claiming this interest was filed June 9, 1875, in the name of the La Beaume heirs. These suits were ordered by the court below to be consolidated (folio 78). Just after the La Beaume petition was filed, a majority of the petitioners therein assigned their rights in the land to three of the petitioners in the original petition, viz, Henry, Leon A., and Julius Clamorgan (folio 407).

The claim is for land amounting, by various estimates, to from about 38,000 to 1,800,000 acres. The judgment below was for 94,136 acres. From this judgment both the United States and the petitioners have appealed (folios 177, &c.), Cyprian Clamorgan appealing *alone* because of his peculiar position as claiming solely under the original petition, and not interested in that of the La Beaumes. The form of the cession to James Clamorgan is stated to have been as follows (folios 4, &c., 325, 331, and 335):

The petition filed on the 28th of July, 1873, set forth that one James Clamorgan, then an inhabitant of Louisiana residing in Saint Louis, on the 1st of March, 1797, presented his petition to Lieutenant-Governor Trudeau, praying for a grant of the lands in question, particularly described as—

A tract of land on the western side of the Mississippi some leagues above the mouth of the Missouri, bounded on the one side by the little river called La Charette, or Dardenne, and on the other by the little river called Au Cuivre, one on the south, the other on the north of the boundaries to those two sides; also 60 arpents of land in front, on the banks of the Mississippi, immediately adjoining the mouth of the first above-named river, La Charette, in descending the current of the Mississippi,

and again 60 arpents in front, also on the banks of the Mississippi, adjoining immediately to the upper side of the mouth of the second above-named river, Au Cuivre, in ascending the current of the Mississippi; the depth of the three different above-described tracts of land to be extended by two lines starting from the banks of the Mississippi, one from the most southern and the other from the most northern point of the front of the above-demanded tracts, which two lines shall be run parallel on each side in a westerly direction until they reach the top of the high hills in the rear, and from there the said two lines to be continued and prolonged in the same westerly direction until they reach a point at the distance of 200 arpents from the foot of said hills, and then those two extreme points shall be connected together by a straight line, which shall be so run as to form the fourth side of the said three tracts hereabove demanded, the said lines encompassing in their extent all the waters of the above-mentioned rivers La Charette, *alias* Dardenne, and Au Cuivre, in order that hereafter the petitioner may erect saw and grist mills thereon, also place there a number of cattle, have slaughter-houses, and send salt meat to the capital.

That, accordingly, on the 3d of March, 1797, the said lieutenant-governor ordered that the "surveyor of this jurisdiction (as soon as the occupations of his place will permit) shall survey in favor of the party interested the extent of land he solicits, in the way and manner described in the foregoing document, which, together with the plat and certificate of survey and of the boundaries which shall be set to said land, will form the title of concession, which in due time he shall have to lay before the general government of the province in order to get its approbation and record."

That afterwards, on the 5th of April, 1797, Governor-General Carondelet, upon having the concession to

Clamorgan submitted to him, ratified the same by a note addressed to the lieutenant-governor, as follows:

I have read your official note dated the 11th of last March, in which you state the motives which have induced you to grant to Mr. Clamorgan the tract of land situated between the two rivers La Charette and Au Cuivre, both emptying into the Mississippi, also 60 arpents to the north and 60 arpents to the south of said rivers, which serve to determine the situation of said land, having the Mississippi in front. Two parallel lines are to be drawn running in the interior of the country until they reach, at a distance of 200 arpents, beyond the foot of the first hills, conformably to the solicitation of the party interested, of which I do approve, Clamorgan having deserved this favor from the government.

The title of the original petitioners to represent James Clamorgan is stated thus:

Upon the 20th of October, 1813, James Clamorgan sold his right to one Tholosau (folio 14), who, four days afterwards, transferred it to Cyprian M. and Maximin Clamorgan, natural sons of James. These persons died intestate, and without heirs, in or about 1827, whereupon their rights escheated to the State of Missouri. In 1863 the State relinquished its rights to the petitioners, the two former being natural children and the two latter children of another natural child of Apauline Clamorgan, the natural sister of Cyprian M. and Maximin, mentioned above.

By an amendment to their petion (folios 45, &c.), the original petitioners state that Cyprian M. Clamorgan left a will, by which he devised his interest in the land to said Apauline, since dead, and her children, Louis, Henry, and Louise. Such amendment also gives the act of the legislature of Missouri, relied upon as invest-

ing the petitioners with the right of such State as aforesaid, which is as follows:

AN ACT for the relief of Henry Clamorgan, Cyprian Clamorgan, and the heirs of Louis Clamorgan, deceased.

Whereas the administrator of Cyprian, Martial, and Maxime Clamorgan did, on the —— day of December, 1859, sell to the highest bidder all the right, title, and interest of his intestates in and to a certain certificate of location, issued by the surveyor-general on the eighth day of August, in the year 1859, to Regis Loisel, or his legal representatives, for thirty-eight thousand one hundred and eleven and ten-hundredths acres of land, located in the Territory of Kansas, for the sum of three thousand and six hundred dollars; and whereas the said Cyprian, Martial, and Maximo Clamorgan, at the time of their decease, had no legal heirs according to the laws of inheritance of the State of Missouri; and whereas Henry Clamorgan, Cyprian Clamorgan, and the children of Louis Clamorgan, deceased, are the sole natural heirs of the said Cyprian, Martial, and Maxime Clamorgan, and alone have a natural claim to the estate of the said intestate estates: Therefore,

Be it enacted by the general assembly of the State of Missouri,

§ 1. That the court of probate Saint Louis County be authorized and directed, on application of the parties in interest, to hear testimony to ascertain who are the natural heirs or claimants of the estate of Cyprian, Martial, and Maxime Clamorgan, the deceased intestates.

§ 2. That when the natural heirs or claimants of said estates are ascertained, the said estate shall be administered and distributed among such natural claimants according to the laws of distribution in all respects as if such natural claimants were the legitimate and lawful heirs of said intestates.

§ 3. That the State of Missouri does hereby relinquish all claims to said estate by virtue of the law of escheats, or otherwise, in favor of the said natural claimants.

§ 4. That this act to take effect from and after its passage.

Approved March 23, 1863.

To this is appended a record of certain proceedings in the probate court of Saint Louis, establishing that the petitioners are natural heirs of Cyprian M. and Maximin Clamorgan, and ordering the administrator of such persons to pay to them certain sums of money mentioned.

The United States first filed a *demurrer* (folio 25), and upon that being overruled, a *plea* (folio 36) to the petition; but it is not important to consider these any farther. By subsequent answer (folio 67) the United States denied all the material averments of the petition; and alleged in particular that (1) the land in question had not at the time of the cession of Louisiana been severed from the royal domain of the Spanish Government, *the concession* being only inchoate, and the description vague; (2) the *conditions* of taking possession, viz, building mills, slaughter-houses, &c., were never performed; (3) the above act of assembly did not purport to legitimate the petitioners for any purpose except the special one named therein, and in any case was not competent to confer rights *against the United States;* and (4) although Tholosau, as aforesaid, did transfer the right, as above, to Cyprian M. and Maximin Clamorgan, yet that the deed executed therefor was not recorded until the 14th of October, 1816,; that previously thereto, to wit, on the 9th day of May, 1816, said Tholosau had conveyed such right for a valuable consideration to Louis La Beaume, the deed therefor being duly recorded on the same day, by virtue of which all such right vested in La Beaume, and since his death in his heirs, &c.

The petition of the La Beaume (folio 110) was filed upon the last day during which for such purpose the act of June 10, 1873, remained in force; and it set forth the same facts as are alleged in the original petition, except that it relied upon the sale by Tholosan to their ancestor, instead of a devolution of title through Cyprian M. and Maximin Clamorgan. The answer thereto by the United States (folios 79 and 157) is merely a copy of the original answer. Upon folios 407, &c., will be found an assignment, dated June 13, 1875, by several of the La Beaume heirs of all right to the Clamorgan concession to the petitioners, excepting Cyprian. In this assignment one Blow, as next friend (folios 42–3), represents four infant petitioners; and the general consideration is stated to be one hundred dollars.

Several maps of the land in question are on file, and folio 171 is a report as to their several *contents*. The oral evidence in the causes is given by—

Gascon (a clerk in the surveyor general's office of Louisiana, and a practical surveyor), who thinks the Plan F duly represents the land described in the concession to James Clamorgan (folios 74, &c.).

Eversheed (who has held various offices connected with Spanish and Mexican grants in Louisiana and California and is familiar with such grants), who also regards Plan F as duly representing the Clamorgan concession, but is not a professional or practical surveyor (folios 194, &c.).

Fish (recorder of land titles, &c.), who proves certain letters and affidavits (folios 206, &c.).

The above were witnesses for the petitioners. For the defendants were introduced:

Pitzman (county surveyor of Saint Louis County), who does not think that a survey can be made under the concession except by abandoning some of its directions, and states his reasons therefor (folios 216, &c.).

Cozzens (who has been engaged in surveying Spanish titles all his life), who thinks that the calls in the concession are very ambiguous, and that no location can be made according to them (folios 239, &c.). (See Denise against Ruggles, 16 How., 244.)

Salomon, whose testimony is to the same effect (folio 459).

Hesse (surveyor and civil engineer), who thinks it impossible to locate the concession and have regard to its calls (folios 281, &c.).

ARGUMENT.

2 The transaction evidenced by the Clamorgan petition, Trudeau concession, and letter of Carondelet to Trudeau, did not separate the land in question from the royal domain. In order for such separation, a future survey was provided, to be returned before, and considered by, the authorities who were to make the grant. (See the general *modus operandi* of such transactions described in Fremont's Case, 17 How., 554.)

Upon such survey it would have appeared that the calls were contradictory, and the question thereby raised is one peculiarly fit to have been decided by the Spanish granting authorities. Whatever rules of construction a court may regard itself as authorized to resort to in order to determine an ambiguity in the intention of parties to a transaction evidently closed, the case is different when, as here, confusion has arisen out of the suggestions of a petitioner for a concession, and there

* This Court has no jurisdiction because, as appears upon the petition (folios 10 & 14) the claim has been previously twice rejected by Commrs. &c., upon its merits Scull's case, 9 How. U.S. at p. 417

exists at least a reasonable doubt whether the Spanish authorities considered the transaction complete. If the court shall consider that in case surveys like those now before it had been made and returned to the Spanish authorities these would have had a reasonable discretion in determining between the conflicting calls, it seems to follow that in the case as it now appears no complete severance has been made. The principle as to severance suggests that any language effecting it shall be clear and not such as must be explained, if at all, by mere technical rules of construction. Granting that, if the concession included only the first of the three tracts asked for by Clamorgan, the closing line of the tract would appear *by implication* to have run from the head springs of the Au Cuivre to that of the Dardenne; yet, in view of what is *expressed* upon the subject of such closing line, such implication cannot arise. Upon the face of the grant, as explained by the oral testimony in the case, it appears that the two points, at the distance of 200 arpents beyond the foot of the high hills, cannot be determined; and these points are requisite to the closing line expressly provided for. (See Scull's Case, 98 U. S., 410.)

2. The Spanish authorities intended that possession, the erection of mills, &c., should be a condition precedent for the grant (Boisdoré's Case, 11 How., 63; Simons's Case, 12 How., 433; Glen's Case, 13 How., 250). The reference in the papers to Clamorgan's previous merits was for the purpose of explaining why he was given the privilege of perfecting a right to so vast a tract of land upon complying with such comparatively insignificant conditions, not for that of nullifying those conditions entirely. On the face of the record, he appears to have been a person of large imagination, and prone to specu-

late upon a great scale. In the present case he asked for some million of acres, more or less; and in Glen's Case (above) he appears as claimant for some half million more, about New Madrid. These vast concessions at once suggest that they were sought, and made, chiefly upon an expectation of benefit to the public, the private benefit to the petitioner being incidental and sometimes indirect.

The Bastrop Case (U. S. *vs.* Philadelphia, &c., 11 How., 609) differs from the present merely in presenting this idea in detail; but the principle in all of them is the same; so that the public good suggested upon the face of the concession must be considered as of its essence.

The statute of Missouri, above set forth, does not purport to legitimate the petitioners for the purpose in question, and if it did, would be incompetent to confer upon them this peculiar chose in action *against the United States* (Act 1860, chap. 188, secs. 1 and 11), which, upon the death of Cyprian M. and Maximin Clamorgan, intestate and without heirs, did not escheat, but in the nature of things *ceased*. That the statute had only a limited effect appears by its statement that Cyprian M. and Maximin Clamorgan had died *intestate*, which, in respect to Cyprian M., was not true as regards the land in question, although it was as to the land mentioned in its preamble. He devised all his land *within Missouri*, which includes the present land, but not the lands in Kansas referred to in the preamble.

The will of Cyprian M. Clamorgan (fol. 411) conferred no right upon the petitioner Cyprian except so far as he claims under the will of his mother, the said Apauline (fol. 418); and the share of Louise, mentioned in the will of said Cyprian, has been *lost* by her death after

the death of her mother, she being a natural child, and having died intestate and without issue (fols. 446 and 422).

The record as regards the interest of the La Beaume heirs is contradictory, and stands thus:

1. *Upon the pleadings in the original petition*, that interest stands upon an assertion contained in the answer that La Beaume, to whom Tholosau conveyed some three years after he had conveyed the same land to Cyprian M. and Maximin Clamorgan, was a purchaser for value. But no proof is made of such allegation. The deed reciting a consideration for $2,000 is among the proofs; but this is not evidence as against third persons. (Carver *against* Jackson, 4 Pet., 1; and notes to Bassett *against* Nosworthy, 2d Leading Cases in Equity, ed. 1877, p. 116.)

2. *Upon the pleadings in the La Baume petition*, there is an allegation by the petitioners that Tholosau "sold and transferred the same lands and all his rights under the said sale to their ancestor." No allegation is made of his being a purchaser for value; but the answer to the original petition having been by order of court directed to stand as an answer in the La Beaume case "as far as the same is applicable," there appears upon its face the same allegation as to the manner in which La Beaume acquired title as mentioned above.

If this allegation, which seems inadvertent as regards the La Beaume petition, shall be regarded as "applicable" thereto, it will follow that no issue is made in the second petition as regards a title which, so far as the original petition is concerned, must be held to fail.

The Missouri act of 1804, which is the foundation of

the La Baume title (Territorial Laws, chap. 6, sec. 8), after providing that all deeds and conveyances concerning lands shall be recorded, &c., *within twelve months after their execution*, proceeds as follows: "And every such deed and conveyance that shall at any time after the publication hereof be made and executed, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void as against any subsequent purchaser or mortgagee for valuable consideration." The rule of law seems to remain the same under subsequent legislation. (See Bowman *vs.* Lee, 48 Mo., 335; Clamorgan *vs.* Lane, 9 Mo., 442.)

CHAS. DEVENS,
Attorney-General.

SAMUEL F. PHILLIPS,
Solicitor-General.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1879.

THE UNITED STATES, APPELLANTS,
vs.
HENRY CLAMORGAN, *et al.*, APPELLEES. } No. 81.

HENRY CLAMORGAN, *et al.*, APPELLANTS,
vs.
THE UNITED STATES, APPELLEES. } No. 82.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

SUPPLEMENT TO BRIEF

For Henry Clamorgan, Leon A. Clamorgan, and Julius Clamorgan, Appellants in suit No. 82, for same as Appellees in suit No. 81, and for the heirs of Louis Labeaume, as Appellants and Appellees in the same suits.

J. L. BRADFORD,
A. D. ANDERSON,
WILLIS DRUMMOND,
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Solicitors.

W. H. MOORE, PRINT. NO. 511 ELEVENTH ST.

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SUPPLEMENT TO BRIEF

For Henry Clamorgan, &c.

Although the record in this case shows that the Clamorgan claim has been repeatedly submitted to Boards of Commissioners, charged by Congress with the duty of ascertaining, listing and reporting upon private land claims, and that it has been reported upon by them, adversely, it has not been twice rejected upon its merits by such boards, and does not, therefore, come within the purview of the third section of the act of Congress, approved June 22, 1860, so as to exclude the courts from taking jurisdiction over it, and confirming it under the provisions of the eleventh section of said act.

In the Scull case, 98 United States Reports, page 517, this Court held that so much of the eleventh section of the aforesaid act of Congress as excluded, from the jurisdiction of the Courts, claims coming within the purview of the third section thereof, had reference to the proviso of the latter section.

As that proviso, so far as it has a bearing on this case, relates

exclusively to claims "already twice rejected on the merits" by previous boards of commissioners, "acting under authority of Congress," its meaning cannot be ascertained and determined by reference, alone, to the reports of such boards, but must be gathered from such reports, taken and considered in connection with the acts of Congress, under and pursuant to which they were made, for these acts not only created the boards referred to, but defined their jurisdiction and powers, and prescribed the manner in which they should proceed in the examination, classification, listing and reporting of claims submitted to them.

The act of 1860, in its exclusion of claims from further consideration, which had "already been twice rejected on the merits, by previous boards," had reference only to rejections made "under authority of Congress," and therefore it is plain that the exclusion was confined to claims, which the previous boards referred to had been authorized and empowered by Congress to dispose of on their merits, and did not extend to or embrace claims not made; by the acts creating such boards, and defining their jurisdiction and powers, subject to final disposition, by them, on the merits. A rejection on the merits necessarily involved the authority and power to render a final decision thereon. This the boards, organized previous to 1860, did not generally possess, and, when they did possess it, their authority to dispose of claims on their merits was confined to a certain class or classes of claims specified in the act, conferring the authority. As a general rule the Acts of Congress, passed prior to 1860, for the creation of boards of commissioners, simply authorized such boards to ascertain, classify, list and report claims to Congress, with an opinion, but did not make their opinions conclusive or final, nor empower them to act judicially, or render a final decision on the merits of claims presented to them. Under the authority conferred the reports and opinions of boards were simply made and rendered by way of information to Congress, which reserved to itself the exclusive right and power to confirm or reject the claims reported, and as was well said by this Court in the Scull case, *supra*, until action by Congress nothing was concluded, and if Congress failed to act the previous inquiry amounted to nothing.

Exceptions to the above stated general rule are found, however, in some of the acts of Congress, which as to certain and specified classes of claims clothe the boards with judicial or *quasi* judicial

powers, and authorize them to decide and render final judgment, as to the validity of claims and confirm them—see the fourth section of the act of Congress, approved March 3, 1807, 2 Statutes, p. 440, and the fifth section of the act of Congress, approved May 8, 1822, 3 Statutes, page 709. As in these exceptional cases the judgments of the boards were on the merits and final, their refusals to confirm claims were necessarily rejections on the merits, and must be so held and treated, but their adverse opinions on claims within the general rule, above stated, under which they were simply authorized and required to ascertain, classify, list and report claims to Congress for its action, cannot be so held or treated, for the very good and sufficient reason that as to those claims the power to render judgment on the merits by way of affirmance or rejection was not delegated to the boards, but reserved to Congress, which merely used the boards for the purpose of obtaining information.

This view of the law is sustained by this Court, not only in the Scull case, above referred to, but also in the case of the United States v. Percheman, 7 Peters, page 51. In the latter case, (p. 89,) the Court, in construing an Act of Congress analogous in all material respects to that under which the Clamorgan claim was filed, examined and reported upon by the old or first board of commissioners, uses the following language:

"On the 8th of May, 1822, an act was passed for ascertaining claims and titles to land within the territory of Florida. The first section directs the appointment of commissioners *for the purpose of ascertaining* the claims and titles to lands within the territory of Florida, as acquired by the treaty of the 22d of February, 1819.

"It would seem from the title of the Act, and from this declaratory section, that the object for which these commissioners were appointed was the ascertainment of these claims and titles. That they constituted a board of inquiry, not a court exercising judicial power and deciding finally on titles."

The court further, (p. 90), after showing that the fourth section might in its language seem to invest the commissioners with judicial powers and enable them to decide as a court in the first instance, for or against the title in cases brought before them, and to make such decision final, if approved by Congress, rebuts the idea that Congress intended to give them such power and adds,

"that it was necessary to ascertain these claims, and to ascertain their locality, not to decide finally upon them. The powers to be exercised by the commissioners under these words, ought therefore to be limited to the object and purpose of the act. The fifth section, in its terms, enables them only to examine into and confirm the claims before them. They were authorized to confirm those claims only which did not exceed one thousand acres.

"From this review of the original act, it results, we think, that the object for which this board of commissioners was appointed, was to examine into and report to Congress such claims as ought to be confirmed, and their refusal to report a claim for confirmation, whether expressed by the term 'rejected' or in any other manner, is not to be considered as a final judicial decision of the claim, binding the title of the party; but as a rejection for the purposes of the act.

"This idea is strongly supported by a consideration of the manner in which the commissioners proceeded, and by an examination of the proceedings themselves, as exhibited in the reports to Congress. The commissioners do not appear to have proceeded with open doors, deriving aid from the argument of counsel, as is the usage of a judicial tribunal, deciding finally on the rights of parties, but to have pursued their inquiries like a board of commissioners, making those preliminary inquiries which would enable the government to ascertain the great bulk of titles, which were to be confirmed, not to decide ultimately on titles which those who had become American citizens legally possessed."

After reviewing the acts amendatory of and supplemental to that of May 8, 1822, (in some of which registers and receivers had been authorized to act as commissioners,) the court says (page 94,) that "the decision of the register and receiver could not be conclusive for another reason. Their power to decide did not extend to claims exceeding one thousand acres, unless the claimant was an actual settler, and it is not pretended that either the petitioner, or Francisco de Sanchez, his grantee, was a settler as described in the third section of the act of 1824. The rejection of this claim then by the register and receiver did not withdraw it from the jurisdiction of the court, nor constitute any bar to a judgment on the case according to its merits."

The reasoning of the court in this case of Percheman applies with equal force to the Clamorgan claim; for although the court,

in deciding the Percheman case, considered and gave weight to the words "not finally acted upon," as used in the fourth section of the act of Congress, approved May 26, 1830, its construction of the original act of May 8, 1822, clearly showed that outside of the fifth section thereof (which conferred upon the commissioners the power to decide claims upon their merits, and confirm them where the amount was limited to one thousand acres,) they were merely a committee of inquiry, without judicial powers and without authority to reject claims upon their merits, so as to bind the title of a claimant. The argument of the court is clearly to the effect that where a board of commissioners is merely authorized to ascertain and report claims to Congress for its action, and not to pass upon them as a judicial tribunal, it cannot reject them on the merits; and this is in accordance with common-sense and the principles of justice and equity. Nothing can be more absurd than the claim that the mere report of an examining board, possessed of no judicial power or authority to finally pass upon titles, is a rejection of a claim founded in law and equity. The Congress of the United States surely cannot be charged with having invoked so absurd a principle or rule, for the purpose of evading treaty obligations and destroying and confiscating the estates of its own citizens.

Neither the old nor the new board of commissioners in Missouri had the power to confirm or reject Clamorgan's claim on its merits. Aside from the jurisdiction conferred upon the old board by the 4th section of the act of Congress, approved March 3, 1807, it was simply charged with the duty of ascertaining, classifying, listing and reporting claims to Congress, and had no judicial powers Its jurisdiction was limited and restricted by the objects and purposes of the act which created it, and extended to nothing else. Its jurisdiction to decide claims on their merits, under the fourth section of the act of March 3, 1807, was restricted to claims not exceeding a league square. The Clamorgan claim cannot be held to come within the purview of this section, and therefore was not subject to either confirmation or rejection on the merits by said board.

But, independent of the foregoing facts and considerations, it clearly appears, by reference to the report of said board to Congress, that, although it was opposed to a confirmation of said claim by Congress, it did not reject it or pretend to reject it, either

on the merits or otherwise. The report of the old board, made November 14, 1811, appears in State Papers, volume 2, Gales & Seaton's edition, page 649. It is very brief, but it fully recognizes the fact that Clamorgan produced a concession from Trudeau, with accompanying documents and evidence to support it, all of which are now in evidence before this court, (printed record, pp. 53–58, and pp. 124–138,) and prove beyond question the authenticity and genuineness of the concession, and that it was based upon a valuable and executed consideration. The report of the board contains no discussion of the facts. It makes no specific objection, either to the claim or the evidence produced to support it, and therefore the conclusion is inevitable that no valid objection could have been made to either, and that the claim was invulnerable on the merits. The report closes as follows: "It is the opinion of the board that this claim ought not to be confirmed."

If we ask for the reasons upon which this general opinion was based, no answer is to be found in the report. So far as this report goes, it forbids the conclusion that the opinion of the board related in any manner to the merits of the claim, for it recites facts showing a valid and meritorious concession to Clamorgan, and these facts are not questioned in or by said report. But if the opinion of the board had clearly and unquestionably related to the merits of the claim it would not have been in any sense a rejection of it. On its face the report did not purport to be a rejection of said claim. It neither declared that it had been rejected, or was thereby rejected. It did not relate to any action taken or to be taken by the board, but directly and exclusively to future action by Congress. It was simply advisory, and addressed to the judgment of Congress, where all future action was to be, and which alone had power and jurisdiction to confirm or reject the claim presented by the report. The opinion merely expressed what the board thought Congress ought to abstain from doing, and not what the board had done or intended to do. It was nothing more than the utterance of a thought by the board, not an action on its part. Neither was the action or the opinion of the second or new board to which the Clamorgan claim was submitted, a rejection of the same on the merits or otherwise.

This board proceeded under the act of Congress, approved July 9, 1832, 4 Statutes, page 565, which did not either directly or

indirectly confer any judicial power upon it, or authorize either the confirmation or rejection of claims by it, but restricted it to examining, classifying, and reporting claims for the action of Congress. The sole object of the act, in the creation of the board, was to constitute a committee of inquiry to examine and report the unconfirmed private land claims in Missouri, in order that Congress might be enabled to render a final decision upon them. The board was not authorized to render decisions for or against any class of such claims, but simply to classify and report them.

The method of classification was prescribed, and it was to be made so as to show: first, "what claims, in their opinion, would, in fact, have been confirmed, according to the laws, usages and customs of the Spanish Government, and the practice of the Spanish authorities under them, at New Orleans, if the Government under which said claims originated had continued in Missouri; and, secondly, what claims, in their opinion, are destitute of merit in law or equity, under such laws, usages, customs and practice of the Spanish authorities aforesaid." The board was required to assign its reasons for the opinions so to be given.

The power of the board, under the act, extended only to a classification of claims, (according to the foregoing method or rule,) a statement of its reasons therefor, and a report of the claims so classified, with the evidence upon which they were based, &c., and to nothing else. Congress reserved to itself the power to decide as to whether the claims so classified and reported, or any of them, should be confirmed or rejected on the merits, or otherwise; and this power in Congress was exclusive. Therefore, the classification, opinion and report of the board cannot be held to be a rejection of a claim in any case, or in any sense whatever. Being without power to act judicially, or to decide as to the validity of titles or claims, as between the claimants and the Government, the board was necessarily without the power to reject claims on the merits; and in the Clamorgan case they did not attempt or pretend to do so, but simply reported the claim for the decision of Congress; for they say in their report on the list of claims, embracing Clamorgan's, (8 State papers, page 22,) that "the plan adopted by the board in making up the transcripts of the claims. exhibits at one view the whole subject, *and will enable Congress to dispose of them according to their respective merits.*"

This clearly shows that the board had not disposed, or at-

tempted to dispose of, the claim on the merits; but left it for Congress to dispose of on the merits—as they were required to do by the act of July 9, 1832.

It is true that the board had, in its meeting on the 26th of September, 1835, (printed record in this case, pp. 140, 141,) expressed the opinion that the Clamorgan claim ought not to be confirmed, in the following language:

"The board are unanimously of the opinion that this claim ought not to be confirmed, believing it to have been disregarded by both Trudeau, the lieutenant-governor who made the grant, and by his successor, Delassus."

But this did not constitute a rejection of the claim in any sense; but was a mere opinion, addressed to the judgment of Congress, which alone had power and authority to reject it. Like the opinion of the old board, it related to what Congress should abstain from doing, and not to what the board had done or contemplated doing, and was simply advisory. It did not contain a single word showing an act of rejection on the part of the board, or any intention on its part to take such action. But if it had been intended as a rejection, it was not based upon the merits of the claim, and was not a rejection of it on the merits. It was based solely upon the assumption or belief that Trudeau and Delassus had disregarded the claim, and not that the claim was defective, illegal or fraudulent, and therefore did not relate to the merits at all. It will be seen by reference to the act of July 9, 1832, that if the board had power to reject, that power was clearly limited and confined to cases in which the claims, in its opinion, were "destitute of merit in law or equity," under the laws, customs, usages and practice of the Spanish authorities, and did not embrace any other.

The board no where asserts that this Clamorgan claim is destitute of such merit, but on the contrary shows conclusively that it is not. In its final report, 8 State Papers, 22, it says with reference to this claim:

"The board takes this occasion to say that the concession to Clamorgan, and the accompanying documents which have been presented to them, give no evidence of being surreptitious, and they feel fully convinced that it was the intention of the government of the country to make the claimant compensation for his expen-

ditures in maintaining a military force to protect the trade of the Missouri."

The board then proceeds to express the belief that there must have been some procedure in relation to the claim not brought to light, that the surveyor could not have been notified by Clamorgan of his grant and that Clamorgan had been guilty of such neglect as would amount to a forfeiture—a mere theory confessedly without facts or proof to support it—and concludes as follows: "The board therefore could not recommend this claim for confirmation, believing that had the Government of Spain been continued over this country to this day the tract as designated would not be confirmed to the claimants; but it is more than probable that if the renumeration had not been made, which it seems was intended by the grant, a location might be patented in some part of the domain where it would not be prejudicial to others."

This is a full recognition of the merits of the claim by the board, and precludes the possibility of a conclusion that their opinion, adverse to its confirmation, was on the merits.

According to this statement of facts by the board the claim was exceptionally meritorious, and these facts are not offset or overcome by the unsupported hypothesis of the board that there must have been something affecting the claim not brought to light. The supposition of the board that Clamorgan had abandoned his claim, or forfeited it by neglect to have it surveyed, is fully offset and overcome by its first report under the Act of July 9, 1832, (State Papers, Vol. 5, Green's edition, page 706,) in which it shows that had it been abandoned or forfeited the lands would have been re-annexed to the public domain by judicial decree, and that there was no time limited in which a survey should be made; that a survey was not essential to title under Spanish grants; that it was difficult to procure surveys before the change of sovereignty, and afterwards impossible owing to our laws, &c. &c.

The report of the board, taken as a whole, proves conclusively that the Clamorgan claim was not rejected or intended to be rejected on the merits, and that it was not subject to such rejection.

The adverse opinion of the board must be attributed to policy, and a disposition on its part to shield and protect the settlers who had, before 1835, established themselves within the supposed limits of the claim. A list of these settlers is appended to the final report of the board, and the report shows the utmost solicitude on

the part of the commissioners that they should not be disturbed by a confirmation of the claim, and it is evident that but for these settlers the claim would have been fully indorsed by the board as entitled to confirmation. Had the board been proceeding under an act like that of 1860, providing lieu lands in place of those disposed of, the adverse opinion would never have been rendered or heard of.

If it be said that an implication arises that the action of the board was a rejection of the claim on the merits, from the fact that Congress provided in the third section of the act of July 9, 1832, that lands embraced in the second class, above referred to, should be subject to sale from and after the final report of the board, and thus imputed finality to the action of the board as to that class, we answer that the authority to place lands in that class depended upon a finding and opinion of the board that the claim was destitute of merit, in law and equity, under the laws, usages, customs and practice of the Spanish authorities, and that no such finding or opinion appears in the report of the board in this case, and therefore the numerical classification of the Clamorgan claim was wholly unauthorized and void. The substance of said report shows that the claim was not destitute of merit in law or equity, that it properly and rightfully belonged to the first class, and should have been placed there by the board. The substance and not the form must govern under the act of 1860, which regards action on the merits only.

But in view of that provision of the Constitution of the United States which declares that no person shall be deprived of life, liberty or property without due process of law, it will hardly be contended that Congress intended to make the action of the board final and binding as to titles in claims of the second class, or that it had the power to do so. It simply intended that claims of the second class should not further operate as a reservation of lands from disposition; but did not, as appears by the subsequent act of 1860, providing for a re-examination and adjudication of private land claims, notwithstanding sales and dispositions of the lands covered by them, intend to forever forbid the assertion of such claims because of such dispositions. The act of 1832, therefore, creates no presumption that the action of the board as to lands of the second class was a rejection on the merits, or final.

2. It was not necessary for defendants to the Clamorgan petition to prove, by evidence other than the recitals in the deed from Tholozan to Labeaume, that Labeaume was a purchaser for value, in order to sustain their allegation to that effect in their answer. The deed had been on record as notice to all the world of what it contained and recited for more than half a century. It had not been questioned or contested, but acquiesced in by the Clamorgans, so far as the record shows. The witnesses to the original transaction between Tholozan and Labeaume were probably all dead or inaccessible, so as to render such proof impossible. It must therefore be presumed that the recitals in the deed are true, so as to relieve the defendants from proving that Labeaume was a purchaser for value. Cholmondeley *vs.* Clinton, 2 Jacobs and Walker's Equity Reports, 141, and Elmendorf *vs.* Taylor, 10 Wheaton, 152.

A majority of the parties to the Clamorgan petition, recognizing the fact that from lapse of time defendants were exempt from producing or making proof of the fact that Labeaume was a purchaser for value, and that the Labeaume deed had become evidence of that fact, so as to place the legal title in the Labeaume claimants, proceded to annex the Labeaume title their own equity.

3. That the lands were situated in St. Charles County at the date of the recording of the Labeaume deed in 1816, is shown by the pleadings, by the act of the Missouri Legislature of December 31, 1813, creating that county, and the transcript of the assessment rolls of St. Charles County for the year 1816, (printed record, pp. 160, 161,) and therefore the recording of the Clamorgan deed in St. Louis County at that date was a nullity.

4. If the Clamorgan title prevails and a decree be rendered in favor of the Clamorgans on their petition, the fruits of the decree must be distributed as follows: To

Henry Clamorgan, ... $\frac{3\,1}{9\,6}$

Leon A. Clamorgan, ... $\frac{3\,1}{1\,9\,2}$ } = $\frac{3\,1}{9\,6}$

Julius Clamorgan, ... $\frac{3\,1}{1\,9\,2}$ }

Cyprian Clamorgan, ... $\frac{1\,9}{9\,6}$

The State of Missouri has . . . . $\frac{1\,5}{9\,6}$

This will be apparent from the following statement, viz:

(a) Jacques Clamorgan conveyed the grant to Jean E. Tholozan.

(b) Tholozan conveyed the same to Cyprian M. and Maximin Clamorgan.

(c) Maximin died intestate and without issue and his half escheated to the State of Missouri.

(d) Cyprian M. died afterwards, having first bequeathed his interest or half to his natural sister Apauline and her natural children, Louis, Henry, and Louisa, each taking one-fourth of his interest.

(e) Apauline left by will her one-fourth of Cyprian M.'s half to her natural children, Louis, Henry, Louisa, and such others as might be born, viz: Cyprian, they receiving one-sixteenth each.

(f) Louisa died without issue and intestate, and her one-fourth *plus* one-sixteenth or five-sixteenths of the half left by Cyprian M. escheated to the State of Missouri.

(g) Louis died leaving two sons, Leon A. and Julius, who took his one-fourth *plus* one-sixteenth or five-sixteenths in equal portions, viz: five-thirty-seconds each, of Cyprian M.'s half.

(h) In 1863 the Legislature of Missouri relinquished Maximin's half of the whole estate to Henry, Cyprian, Leon A. and Julius, they taking as follows: Henry one-third, Cyprian one-third, Leon A. one-sixth, and Julius one-sixth of said half.

5. If the decree be in favor of Henry, Leon A., and Julius Clamorgan, as grantees of the adult Labeaume claimants, who have executed a conveyance to them, and to the other Labeaume claimants, the fruits of the decree must then be distributed as follows, viz.: To

Henry Clamorgan, ... $\frac{2}{9}\frac{2}{6}$

Leon A. Clamorgan, ... $\frac{1}{9}\frac{1}{6}$

Julius Clamorgan, ... $\frac{1}{9}\frac{1}{6}$

Adele Labeaume, ... $\frac{5}{3}\frac{}{0}$

Louis T. Labeaume, ... $\frac{1}{3}\frac{}{0}$

George Labeaume, ... $\frac{1}{3}\frac{}{0}$

Louise Labeaume Tompkins, widow of William Tompkins, deceased, ... $\frac{1}{3}\frac{}{0}$

Edmund Labeaume, a minor, ... $\frac{1}{30}$

William Labeaume, a minor, ... $\frac{1}{30}$

Augustus Jacobson, ... $\frac{4}{96}$

Noemie Labeaume Hicks, executrix of Louis A. Labeaume, commonly known as Alexander Labeaume, deceased, ... $\frac{5}{30}$

The distribution to be made, in the event that the decree be rendered in favor of the Labeaume petitioners, is stated in the brief to which this is a supplement.

J. L. BRADFORD,
A. D. ANDERSON,
WILLIS DRUMMOND,
ROBT. H. BRADFORD,
Solicitors.